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CASES ON CONSTITUTIONAL LAW.

CASES
ON
CONSTITUTIONAL LAW.

WITH NOTES.

PART THREE.

BY
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PART III.

CHAPTER VI.

THE RIGHT OF EMINENT DOMAIN.

IF we examine the subject critically, we shall find that the most important consideration in the case of eminent domain is the necessity of accomplishing some public good which is otherwise impracticable; and we shall also find that the law does not so much regard the means as the need. The power is much nearer akin to that of the public police than to that of taxation; it goes but a step farther, and that step is in the same direction. . . . The butcher in the vicinity of whose premises a village has grown up finds himself compelled to remove his business elsewhere, because his right to make use of his lot as a place for the slaughter of cattle has become inconsistent with the superior right of the community to the enjoyment of pure air and the accompanying blessings and comforts. The owner of a lot within the fire limits of a city may be compelled to part with the property, because he is unable to erect a brick or stone structure upon it, and the local regulations will not permit one of wood. Eminent domain only recognizes and enforces the superior right of the community . . . in a similar way. — COOLEY, J., for the court, in *People v. Salem*, 20 Mich. 452 (1870); and so Cooley, *Const. Lim.* 6th ed. 660, note (1890).

The phrase Eminent Domain appears to have originated with Grotius, and the nature of the power which it designates is accurately described by him. That power is a universal one, and is as old as political society. Writers on public law who succeeded Grotius found some fault with the name, as seeming to import State ownership of all private property; but they agreed as to the real scope of the power in question, and all recognized the name as an accepted one.

The statements of Grotius, and some passages from the leading writers among his successors down to the middle of the last century, sometimes cited in our reports, are given below. To these are added observations from Blackstone. These passages will bring out the conceptions upon this subject which the framers of our first constitutions entertained. It was said by Chief Justice Marshall, in 1827 (*Ogden v. Saunders*, 12 Wheat. 213, 353), in discussing the meaning of the phrase, "obligation of contracts," that, "When we advert to the course of reading generally pursued by American statesmen in early life, we must suppose that the framers of our Constitution were intimately acquainted with the writings of those wise and learned men whose treatises on the laws of nature and nations have guided public opinion on the subject of obligation and contract." This is peculiarly true and peculiarly applicable, as regards the topic now in hand.

It has always been recognized that the gov. was under a moral duty to make compensation
of this nature to the proprietors of real estate

The framers of our Constitution were acquainted with the writings of those wise and learned men whose treatises on the laws of nature and nations have guided public opinion on the subject of obligation and contract.

The effect of our constitutional restraints in their usual form, that which we find in the earlier instruments (*e. g. supra*, p. 412, art. 5), is simply to add to the moral duty of compensation, described by Grotius, a legal sanction. They do not change the scope or nature of the power itself. That power has to do merely with depriving a person of his property for the benefit of the State. It will be observed that another matter was suggested by Bynkershoek (*infra*, pp. 949, 950 n.), an extension of the doctrine of Eminent Domain: *Quidni generaliter statuamus omne damnum quod privati ferunt pro necessitate vel utilitate communi, commune, et proinde ex area publica refarciendum esse?* To this question he gives no decisive answer; but his own opinion seems to incline in favor of this doctrine, that every citizen should be reimbursed for any loss suffered for the public benefit. Undoubtedly no such doctrine was recognized by the writers on public law as an established one. As a broad and universal maxim, English usage knew nothing of it. Our early constitutions did not introduce it. They dealt with this great, well-known, universal power of all governments, to apply to the use of the State, in an exigency, any private property whatever; and gave a legal sanction, not elsewhere existing, to those moral limitations upon it which all the writers on public law had acknowledged.

Some of the later American constitutions, however, (*e. g.* Colorado, *supra*, p. 435, s. 15), beginning with Illinois in 1870, have accepted the moral obligation which Bynkershoek suggested, and have given a legal sanction to that also, requiring compensation where property is damaged by public authority and not merely where it is taken away. And in some cases, even the courts, without the aid of any such clause, moved by the inconsiderate action of legislatures, have sought to reach the same result by their interpretation of the words "property" and "taking." The legitimacy of this latter course of action may be doubted. As to the former, that of changing the constitutions, the propriety of this method cannot be questioned, if any community has come to think so considerable a tying-up of their legislature to be necessary or desirable. That compensation is often omitted when it should be given, is true enough; the remedy for this is another matter. See *infra*, pp. 954, 983 n.¹

From GROTIIUS, *De Jure Belli et Pacis*, lib. i. c. 1 (1625). III. In naming this treatise *De Jure Belli*, we mean to suggest first, what has just been said, Whether any war is just; and, second, In war, what is just? For *jus*, here, means merely what is just; and that rather in a negative than a positive sense, — that *jus* is what is not unjust. That is unjust which is contrary to the nature of a society of rational creatures. . . . IV. There is another meaning of *jus*, different from this, yet derived from it, which refers to a person ["as when we say my right," — Whewell's Translation]; in which sense right [*jus*] is a moral quality belonging to a person, whereby he may justly have or do anything. . . . A moral quality, when perfect, we call *facultas*; when not perfect, *aptitudo*. . . . V. *Facultas* is so called by the jurists, — by its own name. We, hereafter, shall call it *jus*, in the strict and proper sense of that word. Under this are included (1) *Potestas*, — whether over one's self, which is

¹ See also Thayer's *Orig. and Scope Am. Doct. Const. Law*, pp. 29, 30. — Ed.

called liberty; or over others, as the father's or the master's power, (2) *Dominium*, whether full, or not full, as usufruct, or the right of a pledgee (*jus pignoris*); and (3) *Creditum*, the right which stands opposed to debt. VI. This *facultas*, again, is twofold; namely, *vulgaris*, which exists for private use, and *eminens*, which is superior to the *jus vulgaris*, since it belongs to the community, for the common benefit, as against persons and things. Thus the *regia potestas* has under it the father's and the master's power of control; so, as against what belongs to individuals, the *dominium Regis*, for the common benefit, is greater than that of private owners; and [as regards *Creditum*] every one has a greater obligation to the State, for public ends, than to his private creditor.¹

Ibid. lib. iii. c. 20. VII. 1. This also is a common question; what may be done for the sake of peace with the goods of individuals, by kings who have no other right over the property of subjects than the regal right. We have elsewhere said, that the property of subjects is under the eminent domain of the State; so that the State, or he who acts for it, may use, and even alienate and destroy such property; not only in case of extreme necessity, in which even private persons have a right over the property of others; but for ends of public utility, to which ends those who founded civil society must be supposed to have intended that private ends should give way. 2. But it is to be added, that when this is done, the State is bound to make good the loss to those who lose their property; and to this public purpose, among others, he who has suffered the loss must, if need be, contribute. Nor is the State relieved from this *onus*, if, for the present, it be unable to discharge it; but at any future time, when the means are there, the obligation which had been suspended revives.²

From PUFENDORF, *De Jure Naturæ et Gentium*, lib. i. c. 1, s. 19 (1672). *Potestas* (control), in respect of what is one's own, is called *dominium*; *potestas*, in respect of

¹ III. De jure belli cum inscribimus hanc tractationem, primum hoc ipsum intelligimus, quod dictum jam est, sitne bellum aliquod justum, et deinde quid in bello justum sit? Nam jus hic nihil aliud quam quod justum est significat, idque negante magis sensu quam aiente, ut jus sit quod injustum non est. Est autem injustum, quod naturæ societatis ratione utentium repugnat. . . . IV. Ab hac juris significatione diversa est altera, sed ab hac ipsa veniens, quæ ad personam refertur: quo sensu jus est, Qualitas moralis personæ competens ad aliquid juste habendum vel agendum. . . . Qualitas autem moralis perfecta, facultas nobis dicitur; minus perfecta, aptitudo. . . . V. Facultatem Jurisconsulti nomine sui appellant, nos posthac jus propriæ aut stricte dictum appellabimus: sub quo continentur Potestas, tum in se, quæ libertas dicitur, tum in alios; ut patria, dominica: Dominium, plenum sive minus pleno, ut usufructus, jus pignoris: et Creditum, cui ex adverso respondet debitum. VI. Sed hæc facultas rursus duplex est: vulgaris scilicet, quæ usus particularis causa comparata est; et eminens, quæ superior est jure vulgari, utpote communitati competens in partes et res partium, boni communis causa. Sic regia potestas sub se habet et patriam et dominicam potestatem: sic in res singulorum majus est dominium Regis ad bonum commune, quam dominorum singularium: sic reipublicæ quisque ad usus publicos magis obligatur, quam creditori.

² VII. 1. Disputari et hoc solet, quid in res singulorum possint pacis causa statuere, qui reges sunt, nec in res subditorum aliud jus habent quam regium. Alibi diximus res subditorum sub eminenti dominio esse civitatis, ita ut civitas, aut qui civitatis vice fungitur, iis rebus uti, easque etiam perdere et alienare possit, non tantum ex summa necessitate, quæ privatis quoque jus aliquod in aliena concedit, sed ob publicam utilitatem, cui privatas cedere illi ipsi voluisse censendi sunt, qui in civilem coetum coierunt. 2. Sed addendum est, id cum fit, civitatem tenere his, qui suum amittunt, sarcire damnum de publico, in quod publicum nomen et ipse, qui damnum passus est si opus est, contribuet. Neque hoc onere levabitur civitas, si nunc forte ei præstatione par non sit, sed quandocumque copia suppetit, exseret sese quasi sopita obligatio.

The translation of this last passage from Grotius is mainly taken from Dr. Whewell's edition (Cambridge, University Press, 1853). His rendering of the former one is inaccurate, and another is substituted. For a third passage from Grotius, see *infra*, p. 982, note. — Ed.

other persons is, properly speaking, *imperium*; *potestas*, in respect of the property of other persons, constitutes a *servitude*.¹

Ibid lib. viii. c. 5, s. 7. As regards eminent domain, some persons condemn, not so much the thing itself, as its name. For they say that the very nature of supreme rule (*imperium*) established for the public welfare, gives a sufficient title to the prince, when necessity presses, for using the property of his subjects; since all must be understood to be surrendered, without which the common good cannot be obtained; and, further, that it is a swelling phrase, which bad rulers may abuse to squander the resources of their subjects.² But it is idle to contend over words; and it is not unreasonable to designate by a specific name a portion of the supreme rule which manifests itself in a specific way about a specific matter. What the import is of this *dominium* may be gathered from these considerations. It is a matter of natural equity, when there is to be a contribution towards the preservation of anything possessed in common, by those who share in it, that individuals should contribute only a proportional share, and that no one should be oppressively loaded beyond others. The same thing holds in States. But since often the exigencies of a government are such that either urgent necessity does not allow the fixing of the proportions of what is to be collected from individuals, or else some specific possession of one citizen, or of a few, is required for the necessary uses of the State, the supreme government must be able to apply this thing to the public necessities: provided, nevertheless, that what exceeds the proportional share of its owners shall be refunded by the other citizens.³

From HEINECCIUS, *Elem. Jur. Nat. et Gent.* lib. ii. c. 8, s. 168 (1730) Among the inherent rights of supreme power there is, furthermore, the right of imposing taxes and tribute upon its citizens, nay, even of applying to the use of the State their property, when necessity requires it,—a right which is usually called the right of eminent domain. [Note.] We confess, however, that this use of the word is not quite apt, for the conception of *dominium* and that of *imperium* are different things: it is the latter and not the former which belongs to rulers (*imperantibus*). For this reason what Grotius, *de jure belli et pacis*, i. 1, 6, first styled *dominium eminens*, Seneca, *de benef.* vii. 4, more accurately called *potestas*. To kings, he said, belongs the control of all things (*potestas omnium*), to individuals the ownership (*proprietas*) of them. . . . But, so long as the controversy is about the name and origin of the thing, and no one doubts about the actual right of rulers, when necessity requires, to apply to the use of

¹ *Potestas in res proprias, vocatur dominium. Potestas in personas alias, imperium proprie est; potestas in rem alienam, servitus.*

² It behoves a democracy, like our own, to remember that this objection has a distinct application to them. A ruler who is ignorant or careless is no less a bad ruler, because he means well. The evil in question is a specific result; it does not matter what the motives of the ruler are.—Ed.

³ *Dominii eminentis non tam rem, quam vocabulum aliqui damnant. Ipsam enim vim imperii propter salutem publicam instituti, sufficientem principi titulum præbere, urgente necessitate utendi bonis suorum subditorum; eo quod omnia simul concessa intelligantur, sine quibus obtineri bonum commune non potest. Ambitiosum quoque esse id vocabulum, quo mali principes abuti possint ad dissipandas subditorum facultates. Verum uti super vocabulis litigare supervacuum est; ita particulam summi imperii, quæ certo sese modo circa certam rem exserit, peculiari nomine insignire, non præter rationem est. Ejus autem dominii quæ vis sit, ex hisce intelligetur. Naturalis est æquitatis, ut si ad communem quampiam rem conservandam ab iis qui de eadem participant, conferendum quid sit, singuli ratam duntaxat partem conferant, nec unus supra cæteros graviter oneretur. Idem et in civitatibus obtinet. Sed cum sæpe ea sint reipublicæ tempora, ut vel urgens necessitas non admittat ratas partes a singulis colligi, vel certa quæpiam res unius aut paucorum civium ad necessarios usus reipublicæ requiratur, poterit summum imperium eam rem publicis necessitatibus adhibere; ita tamen, ut quod ratam partem dominorum excedit, a cæteris civibus sit ipsis refundendum.*

the State the property of citizens, we see no fit reason whatever for wholly condemning the word, when once it has been accepted.¹

From BYNKERSHOEK, *Quest. Jur. Pub.* lib. ii. c. 15 (1737). That power (*potestas*) wherein a prince excels (*eminet*) his subjects, is what the writers on public law call *dominium eminens* or *supereminens*, — following Grotius, who led in this. L. i. *De Jure B. & P.* c. 3, s. 6, n. 2, and l. ii. c. 14, s. 7 & 8. But I agree with Thomasius, *ad Huberum de jure civitatis* l. i. s. 3, c. 6, n. 38, in thinking it more accurately called *imperium eminens*, rather than *dominium eminens*, for whatever of this right princes use, proceeds from their supreme power. . . . That *potestas eminens* extends to the persons and property of the subjects; and if this were taken away all will readily allow that the State could not be preserved. By this power, if so it seem good to the prince, war is declared, peace made, treaties entered into, tribute and taxes imposed, obligations laid upon subjects and their property, even the whole of them, nay, even the possessions of single individuals seized upon. Of this power none of the wise ever doubted; the whole dispute is over fixing the limits of it. . . . But before you can accurately fix these, all the details (*species*) of supreme power (*imperium eminentis*) must be reckoned up, and we must carefully deliberate and pass upon each. . . . I have determined to treat merely of that part by which the prince, out of his supreme power (*imperio eminenti*), takes away from his subjects an acquired right, whether it consists in a thing itself (*in re*), whether movable or immovable, or in a claim (*in actione*). That the prince may do this, all agree; but it is not equally agreed on what occasion he may do it. Pufendorf, l. viii. *De Jure Nat. et Gent.* c. 5, s. 7, where he treats of this right of the prince, thought that there was no place for the right of eminent domain unless the necessity of the State should call for it, not meaning, however, that the last extreme of necessity should be demanded. Grotius was contented with utility (*utilitate*) only. L. ii. *De Jure B. & P.* c. 14, s. 7; for he said, that in order to take away an acquired right from subjects by virtue of eminent domain, (*ex vi supereminentis domini*), there must be, first, a public use (*utilitas*), and then, if possible, compensation must be made, out of the common funds, to him who has lost what was his. And afterwards, s. 6, the right of subjects is subordinated to this right of eminent domain (*ei dominio*), so far as public uses demand. It is, indeed, true enough that both formerly and now, on all hands, princes have exercised this right for both reasons, as well necessity as utility: but convenience often shades off into necessity, so that you cannot easily tell this from that, and what one man will call utility another will call necessity. For my part I do not urge, nor do I know of any one who does, that the prince may not exercise this right for both reasons. . . . But when a fit reason requires it, whatever he takes away, let him take it with as little harm to his subjects as may be, and upon paying the price out of the common chest. Whoever purposes anything else is rather a robber than a prince. . . . He who requires, as I do, in order to the exercise of the supreme power (*imperium eminens*) public necessity or a public use (*utilitatem*), excludes all other causes, without exception. Since the subject, then, is bound to part with his property for both reasons, as I said, must he also lose it for purposes of public pleasure or æsthetic gratification, or even public decoration alone? I should not think so, nor did the Roman Senate think so in the case of Marcus Licinius Crassus, who objected to leading through his farm

¹ Inter immanentia majestatis jura est etiam jus tributa et vectigalia imperandi civibus; quin et eorum bona, exigente necessitate, reipublicæ usibus adplicandi, quod jus *dominium eminens* adpellare mos est. [Author's note. Fatemur tamen non satis commodè hoc adhiberi vocabulum, quum diversi sint domini et imperii conceptus; et non illud, sed hoc competat imperantibus. Unde quod Grotius, *de jure belli et pac.* i. 1, 6, primus vocavit *dominium eminens*, id Seneca, *de benef.* vii. 4, rectius denominavit *potestatem*. Ad reges, inquit, potestas omnium, ad singulos proprietates pertinet. . . . Sed dum lis est de vocabulo rei que origine, et de ipso jure imperantium bona civium urgente necessitate reipublicæ usibus adplicandi, nemo dubitat, cur vocabulum semel receptum plane proscribendum putarem, nullam omnino idoneam rationem vidimus.]

an aqueduct which the Prætors were building, and which was said to have no other occasion than public pleasure and decoration. . . . But for whatever reason the subject's property or claims (*res vel actiones*) are taken and destroyed, what Grotius adds, in the passage quoted, is fair and just, that the owner's compensation should be paid out of the public money. . . . This, indeed, in these cases. But why may we not lay it down generally, that every loss (*damnum*) which private persons bear for the common necessity or utility, is a common loss and therefore one to be refunded from the common chest? . . . It is fit as regards losses which arise from the calamity of war, that all subjects should bear them with calmness, and that no restitution should ever be made for them. But as to what Consultor says, that the value of lands is not to be paid which are taken for purposes of fortification, perhaps it is true when war is raging, and while laws are silenced by arms, and when sudden and temporary defences are made; but when they are constructed for permanent use, I cannot recognize this as true. The rules which I have brought forward in this chapter and the last are at war with this view, and the usages of nations as received here and elsewhere are at war with it.¹

¹ Illa potestas, qua princeps supra subditos eminet dominium eminens vel supereminens appellant scriptores juris publici, sequuti Grotium, qui ita prævit, l. i. *De Jure B. & P. c. 3, s. 6, n. 2, & l. ii. c. 14, s. 7 & 8.* Assentior tamen Thomasio, *Ad Huberum de Jure Civilitatis*, l. i. sect. 3. c. 6, n. 38, existimanti, rectius, dici imperium eminens, quam dominium eminens: nam quicquid ejus juris exercent principes, proficiscitur a suprema eorum potestate. . . . Potestas illa eminens porrigitur ad personas & bona subditorum, & facile largientur omnes, ea sublata, civitatem salvam esse non posse. Ex ea potestate bellum indicitur, pax pangitur, fœdera ineuntur, tributa & vectigalia imperantur, subditi eorumque bona, etiam in solidum, obligantur, quin & occupantur res singulorum, si ita visum fuerit principi. De ea principis potestate nemo, qui sapit, dubitavit unquam, sed de finibus ejus regundis omnis disputatio est. . . . Priusquam autem hos recte regas, recensendæ omnes species imperii eminentis, de singulis deliberandum & caute pronuntiandum est. . . . De ea specie duntaxat agere constitui, qua princeps, ex imperio eminenti, subditis aufert jus quæsitum, sive id consistat in re mobili, sive immobili, sive in actione. Id principi licere inter omnes constat, sed non æque constat, ex qua causa liceat. Pufendorffius, l. vii. *De Jure Nat. & Gent. c. 5, s. 7*, ubi de eo jure principis agit, existimavit, dominio eminenti locum non esse, nisi reipublicæ Necessitas requisiverit, ita tamen, ut postremum necessitatis gradum non desideret. Grotius sola utilitate contentus est, l. ii. *De Jure B. & P. c. 14, s. 7*; nam, ut jus quæsitum subditis auferatur ex vi supereminentis domini, primum, inquit, requiritur, utilitas publica, deinde, ut, si fieri potest, compensatio fiat ei, qui suum amisit, ex communi. Et mox, s. 6, subditorum jus ei dominio subest, quatenus publica utilitas desiderat. Sane verissimum est, ex utraque causa, tam necessitatis, quam utilitatis id jus & olim exercuisse principes, & nunc passim exercere. Sed & sæpe utilitas in necessitatem incidit, ut non facile hanc ab illa distinxeris; quodque alius utilitatem, alius necessitatem appellabit. Ipse non intercedo, nec scio quemquam intercedere, quominus princeps et utraque causa eo jure uti possit. . . . Sin autem urgeat ratio idonea, quicquid aufert, auferet quam minimo subditorum detrimento, & soluto, ex arca communi, pretio. Qui aliter in animum induxerit suum, prædo potius est, quam princeps. . . . Qui, ut imperium eminens exerceri possit, necessitatem vel utilitatem publicam desiderat, ut ipse desidero, reliquas causas, sine exceptione omnes, excludit. An igitur, ut subditus re sua carere tenetur ex utraque, quam dixi, causa, ita quoque tenebitur, ex causa voluptatis vel amoenitatis publicæ, vel etiam ex causa solius ornatus publici? non putaverim, neque etiam putavit Senatus Romanus in causa M. Licinii Crassi, nolentis per fundum suum derivari aquæductum, quem moliebantur Prætores, quique non aliam, quam voluptatis & ornatus causam habere dicebatur. . . . Ex quacunque autem causa res vel actiones subditorum ad bonum publicum occupantur vel destruuntur æquum & justum est, quod addit Grotius d. loc. pretium domini ex publico esse refarciendum. . . . Atque hæc quidem in hisce causis. Sed quidni generaliter statuamus, omne damnum, quod privati ferunt pro necessitate vel utilitate communi, commune, & proinde ex arca publica refarciendum

From Vattel, *Le Droit des Gens*, liv. i. c. 20, s. 244 (1758). In political society everything must give way to the common good ; and if even the person of the citizens is subject to this rule, their property cannot be excepted. The State cannot live, or continue to administer public affairs in the most advantageous manner, if it have not the power, on occasion, to dispose of every kind of property under its control. It should be presumed that when the nation takes possession of a country, property in specific things is given up to individuals only upon this reservation. The right which belongs to society or to the sovereign to dispose, in case of necessity and for the public welfare, of every possession which the State contains, is called eminent domain. It is evident that in certain cases this right is necessary to him who governs, and therefore that it makes part of the empire or sovereign power, and should be placed among the *droits de majesté*. § 45. When the people, then, confer the empire upon any one, they award to him, at the same time, the eminent domain, unless they expressly reserve it. Every prince who is really sovereign is clothed with this right, when the nation has not excepted it, in whatever way his authority may be otherwise limited. If the sovereign dispose of public property, in virtue of his eminent domain, the alienation is valid as having been made with sufficient authority. And so when he disposes, in an exigency, of the property of a community or an individual, the alienation will be valid, for the same reason. But justice demands that this community or this individual be made whole out of the public money ; and if the State have not enough to do this, all the citizens are bound to contribute ; for the expenses of the State should be borne equally or in a just proportion. In this respect it is like throwing merchandise overboard to save the ship.¹

esse ? . . . Damnum, quod oritur ex calamitate belli, oportet, et omnes subditi æquo animo ferant, nec ejus ulla unquam fit restitutio. Sed quod ait Consultor, non refundi pretium agrorum, qui muniendi ergo capiuntur, fortasse, verum est fervente bello, quamdiu legibus silentium imponunt arma, aut cum munitiones fiunt tumultuariæ, & ad tempus, sed cum exstruuntur in perpetuum, id verum esse nondum potui animadvertere. Repugnant leges, quas hoc & præcedenti capite attuli, repugnant mores, hic & alibi gentium recepti.

¹ Tout doit tendre au bien commun dans la société politique, et si la personne même des citoyens est soumise à cette règle, leurs biens n'en peuvent être exceptés. L'Etat ne pourroit subsister, ou administrer toujours les affaires publiques de la manière la plus avantageuse, s'il n'avoit pas le pouvoir de disposer dans l'occasion de toutes sortes de biens soumis à son empire. On doit même présumer, que quand la nation s'empare d'un pays, la propriété de certaines choses n'est abandonnée aux particuliers qu'avec cette réserve. Le droit qui appartient à la société, ou au souverain, de disposer, en cas de nécessité & pour le salut public, de tout bien renfermé dans l'Etat, s'appelle domaine éminent. Il est évident que ce droit est nécessaire, en certains cas, à celui qui gouverne, & par conséquent qu'il fait partie de l'empire, ou du souverain pouvoir, & doit être mis au nombre des droits de majesté. (§ 45.) Lors donc que le peuple défère l'empire à quelqu'un, il lui attribue en même-tems le domaine éminent, à moins qu'il ne le réserve expressément. Tout prince véritablement souverain est revêtu de ce droit, quand la nation ne l'a point excepté, de quelque manière que son autorité soit limitée à d'autres égards. Si le souverain dispose des biens publics, en vertu de son domaine éminent, l'aliénation est valide, comme ayant été faite avec un pouvoir suffisant. Lorsqu'il dispose de même, dans un besoin, des biens d'une communauté, ou d'un particulier, l'aliénation sera valide, par la même raison. Mais la justice demande que cette communauté ou ce particulier soit dédommagé des deniers publics : & si le trésor n'est pas en état de le faire, tous les citoyens sont obligés d'y contribuer ; car les charges de l'Etat doivent être supportées avec égalité, ou dans une juste proportion. Il en est de cela comme du jet des marchandises, qui se fait pour sauver le vaisseau.

In copying the foregoing passage from an Amsterdam edition of Vattel, of 1775, I observe an interesting confirmation of Chief Justice Marshall's remark on page 945, *supra*. It is entered as a gift to the library of Harvard College from Benjamin Franklin — Ed.

From 1 *Blackstone's Commentaries* (Chitty's ed., 1829) 139 [1st ed. (1765) 135]. So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land. In vain may it be urged, that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good, and to decide whether it be expedient or no. Besides, the public good is in nothing more essentially interested, than in the protection of every individual's private rights, as modelled by the municipal law. In this and similar cases the legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an exchange. All that the legislature does, is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution, and which nothing but the legislature can perform. [Note by Joseph Chitty.] (18) These observations must be taken with considerable qualification, for, as observed by Buller, J., there are many cases in which individuals sustain an injury, for which the law gives no action: for instance, pulling down houses or raising bulwarks for the preservation and defence of the kingdom against the king's enemies. The civil law writers indeed say that the individuals who suffer have a right to resort to the public for a satisfaction, but no one ever thought that the common law gave an action against the individual who pulled down the house, &c. And where the acts of commissioners appointed by a paving Act occasion a damage to an individual, without any excess of jurisdiction on their part, the commissioners, or paviors acting under them, are not liable to an action. 4 Term Rep. 794, 6, 7; 3 Wils. 461; 6 Taunton, 29. In general, however, a power of this nature must be created by statute, and which usually provides compensation to the individual. Thus by the Highway Act (13 Geo. III. c. 78; and 3 Geo. IV. c. 126, sec. 84, 85), two justices may either widen or divert any highway through or over any person's soil, even without his consent, so that the new way shall not be more than thirty feet wide, and that they pull down no building, nor take away the ground of any garden, park, or yard. But the surveyor shall offer the owner of the soil, over which the new way is carried, a reasonable compensation, which if he refuses to accept, the justices shall certify their proceedings to some general quarter sessions; and the surveyor shall give fourteen days' notice to the owner of the soil of an intention to apply to the sessions; and the justices of the sessions shall impanel a jury, who shall assess the damages which the owner of the soil has sustained, provided that they do not amount to more than forty years' purchase. And the owner of the soil shall still be entitled to all the mines within the soil, which can be got without breaking the surface of the highway. Many other Acts for local improvements, recently passed, contain similar compensation clauses.¹

"The power to take private property for public use," said FIELD, J., for the court, in *U. S. v. Jones*, 109 U. S. 513, 518 (1883), "generally termed the right of eminent

¹ It is, perhaps, Blackstone's figurative phrase, that "the public is now considered as an individual treating with an individual for an exchange," that has led some judges and writers to define the right of eminent domain as a right of compulsory purchase. But such a conception must be taken with reserve. This power, apart from any clause of restraint in our written constitutions, must be regarded as a universal power possessed by all governments, — the right to take and to apply to the public use that which the public welfare requires. The obligation to give just compensation, unquestionable and universally admitted, is a moral obligation, not enforceable by courts, it would seem, as against clear and indubitable action of the legislature, unless the Constitution add to this moral obligation a legal sanction. — Ed.

domain, belongs to every independent government. It is an incident of sovereignty, and, as said in *Boon v. Patterson*, 98 U. S. 106, requires no constitutional recognition. The provision found in the Fifth Amendment to the Federal Constitution, and in the constitutions of the several States, for just compensation for the property taken, is merely a limitation upon the use of the power. It is no part of the power itself, but a condition upon which the power may be exercised. It is undoubtedly true that the power of appropriating private property to public uses vested in the general government — its right of eminent domain, which Vattel defines to be the right of disposing, in case of necessity and for the public safety, of all the wealth of the country — cannot be transferred to a State any more than its other sovereign attributes; and that, when the use to which the property taken is applied is public, the propriety or expediency of the appropriation cannot be called in question by any other authority. But there is no reason why the compensation to be made may not be ascertained by any appropriate tribunal, capable of estimating the value of the property. There is nothing in the nature of the matter to be determined which calls for the establishment of any special tribunal by the appropriating power.

"The proceeding for the ascertainment of the value of the property, and consequent compensation to be made, is merely an inquisition to establish a particular fact as a preliminary to the actual taking; and it may be prosecuted before commissioners or special boards or the courts, with or without the intervention of a jury, as the legislative power may designate. All that is required is that it shall be conducted in some fair and just manner, with opportunity to the owners of the property to present evidence as to its value, and to be heard thereon. Whether the tribunal shall be created directly by an Act of Congress, or one already established by the States shall be adopted for the occasion, is a mere matter of legislative discretion."

The Right of Eminent Domain, 19 Monthly Law Reporter (Boston), 241, 247. The right of eminent domain is that attribute of sovereignty by which the State may take, appropriate, or divest private property whenever the public exigencies demand it; or, according to the usual definition, it is the right of taking private property for public purposes. And to this right the obligation always attaches of making just compensation for the property taken. . . .

By our definition, it is the right of taking, appropriating, or divesting property; and so is distinguished, on the one hand, from a right of property, and on the other, from a mere right of regulating the use of property. It can only be exercised when some specific subject-matter of property is required, for which there can be no sufficient substitute; and herein it is distinguished from the right of taxation. . . . Again, the right is distinguished from that of taxation, in that the property taken under it is taken without any reference to collecting the owner's share of the common public expenses, and also in this, that it operates upon individual parties, while the right of taxation deals with the whole community, or with a special class of persons in the community, on some rule of apportionment; and finally, when the right of eminent domain is exercised, compensation must be made to the private party with whom the State is dealing, wherein this right is distinguished from the right of taxation and from all other rights of sovereignty. . . . What is taken under this right, is regarded as so much above or aside from the owner's share of the common expenses; and since it is manifestly unjust that he should be compelled to contribute more than the other members of the community, he must be reimbursed from that common fund to which all contribute, himself as well as the rest. . . .

But while this obligation is thus well established and clear, let it be particularly noticed upon what ground it stands, *viz.*, upon the natural rights of the individual. On the other hand, the right of the State to take springs from a different source, *viz.*, a necessity of government. These two, therefore, have not the same origin; they do not come, for instance, from any implied contract between the State and the individual, that the former shall have the property, if it will make compensation: the right is no mere right of pre-emption, and it has no condition of compensation annexed to it, either precedent or subsequent. (But there is a right to take, and attached to it as an

incident, an obligation to make compensation; this latter, morally speaking, follows the other, indeed, like a shadow, but it is yet distinct from it, and flows from another source. >

See, then, the consequences. If the State appropriate private property to satisfy a public exigency, and fail to make or provide for compensation, has it therefore exercised its power wrongfully? It would seem not: for if a public exigency exist, requiring the property, and it be appropriated accordingly, that, as we have seen, is legitimate; so far all is right, and the citizen cannot complain; and if the sovereign do not make recompense, then he fails indeed in his duty to the individual; but for all that, he does no more than his duty to the community in taking the property, and therefore the individual cannot demand his property back, although the State should never pay him. < He has an eternal claim indeed against the State, which can never be blotted out except only by satisfaction; but this claim is for compensation, and not for his former property. >

Therefore, in the absence of constitutional provisions affecting the question, it would follow that a loss of property from an exercise of the right of eminent domain, which is fair in all respects other than in making or providing for compensation, must be regarded by the courts as *damnum absque injuria*.¹ Every court must hold the assumption of private property to satisfy a public exigency to be just and proper, and an exercise of clear legislative power. And herein such a case would differ from one where the legislature should seek to transfer property from one individual to another, with no pretence of public necessity; such an act would not be the exercise of due legislative power, but would involve an arbitrary assumption of power, and might be reached, as such, by the courts. . . . If there be a public exigency, or if there be room to say that any public advantage is to be gained by the appropriation of private property, or its transfer from one individual to another, then it would seem that the discretion of the legislature could not be controlled (in the absence of constitutional provision) by any power short of the supreme power of the sovereign. For the judiciary may not substitute their discretion for that of the legislature, nor exercise it at all in a matter intrusted to the sole discretion of another department.

Ibid. 241, 323. If the ground taken at the outset of our investigation be the true one, *viz.*: that the right of eminent domain is an inherent right of sovereignty, and therefore the same in all States, and one to be interpreted upon principles applicable the whole world over, — then, of course, in all our American States, this right, so far as it remains unaffected by constitutional provisions, stands upon the general principles which govern the sovereignty in all other countries, and which it has been sought to set forth and maintain in the course of this essay.

All the American constitutions, however, may be said to have provisions that affect this right in some degree; since all provide that the sovereign power of legislation, which includes this right, shall be vested in the legislature; and so in a body constantly changing, and bound by a perpetual obligation to transmit the sovereignty to its successors intact. Thus all the American constitutions, in declaring that the right of eminent domain shall be vested in the legislature, provide, by necessary implication, that the legislature shall not impair or part with it.

A number of the State constitutions have no other provision than this, that can properly be held to apply to our subject.

A majority of them, however, and the Federal Constitution besides, contain a clause (substantially the same in all) that "private property shall not be taken for public purposes without just compensation." . . .

Some States have other provisions explaining or limiting the right of eminent domain, as it exists in the hands of their legislatures, which we will now very briefly indicate. Most of these, it will be noticed, serve only to enunciate, and put under the protection of the judiciary, some one or more of those principles already laid down and enforced in our pages.

¹ But compare Randolph, *Eminent Domain*, s 227. — Ed.

The Constitution of Vermont provides that the owner of property taken, "ought to receive an equivalent in money." That of Ohio has a similar provision, requiring either money or a deposit of money.

That of New York requires that when property is taken, the damages must be assessed by a jury, or by not less than three commissioners appointed by a court of record. It also authorizes the taking of lands for private roads, — the necessity of the road to be ascertained and the damages to be assessed, by a jury, and that amount, together with the expenses of the proceeding, to be paid by the person to be benefited.

The Constitution of New Jersey has the usual provision, to which it is added that "land may be taken as heretofore for public highways, until the legislature shall direct compensation to be made."

The Constitution of Pennsylvania forbids the legislature to authorize any corporate body or individual to take private property for public use without requiring compensation to be made, or adequate security to be given, before the taking. . . .

The constitutions of Mississippi and Kentucky require compensation to be made before the property is taken. That of Ohio has a similar provision, excepting only cases of necessity, demanding immediate seizure.

The Constitution of Ohio also provides that benefits shall not be deducted in ascertaining compensation.

Those of Georgia and Texas forbid the legislature to pass laws emancipating slaves, without the consent of each of the owners previously.

The constitutions of Alabama and Kentucky forbid the legislature to emancipate slaves without their owners' consent, or paying to the owners, previously to such emancipation, a full equivalent in money for the slaves so emancipated.

We have now referred to all the provisions relating to our subject, that occur in the United States constitutions. The clauses in them relating to trial by jury seem to be generally, if not universally, held inapplicable to proceedings under the right of eminent domain. And the same is true of that provision engrafted into a number of the State constitutions from Magna Charta, that "no freeman shall be deprived of his property, but by the judgment of his peers or by the law of the land."¹

¹ The foregoing statement was made in 1856. Now, only three constitutions, New Hampshire, North Carolina, and Virginia are without a clause expressly requiring compensation. Sixteen, beginning with Illinois, in 1870, require compensation even when property has been "damaged;" and three others require it where municipal and other corporations exercise the right in question.

For the existing provisions in all our constitutions, see RANDOLPH, *Em. Dom.*, 401-416. — ED.

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KOHL ET AL. v. UNITED STATES.

condemnation to SUPREME COURT OF THE UNITED STATES. 1875.

purchase a site for

[91 U. S. 367.]

post-office ERROR to the Circuit Court of the United States for the Southern District of Ohio.

This was a proceeding instituted by the United States to appropriate a parcel of land in the city of Cincinnati as a site for a post-office and other public uses.

The plaintiffs in error owned a perpetual leasehold estate in a portion of the property sought to be appropriated. They moved to dismiss the proceeding on the ground of want of jurisdiction; which motion was overruled. They then demanded a separate trial of the value of their estate in the property; which demand the court also overruled. To these rulings of the court the plaintiffs in error here excepted. Judgment was rendered in favor of the United States. . . . [Here follows a citation of the statutes relating to the matter, which is placed in a note.¹]

¹ There are three Acts of Congress which have reference to the acquisition of a site for a post-office in Cincinnati. The first, approved March 2, 1872, 17 Stat. 39, is as follows:—

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury be, and he is hereby, authorized and directed to purchase a central and suitable site in the city of Cincinnati, Ohio, for the erection of a building for the accommodation of the United States courts, custom-house, United States depository, post-office, internal-revenue and pension offices, at a cost not exceeding three hundred thousand dollars; provided that no money which may hereafter be appropriated for this purpose shall be used or expended in the purchase of said site until a valid title thereto shall be vested in the United States, and until the State of Ohio shall cede its jurisdiction over the same, and shall duly release and relinquish to the United States the right to tax or in any way assess said site and the property of the United States that may be thereon during the time that the United States shall be or remain the owner thereof."

In the Appropriation Act of June 10, 1872, 17 Stat. 352, a further provision was made as follows:—

"To commence the erection of a building at Cincinnati, Ohio, for the accommodation of the United States courts, custom-house, United States depository, post-office, internal-revenue and pension offices, and for the purchase, at private sale or by condemnation, of ground for a site therefor,—the entire cost of completion of which building is hereby limited to two million two hundred and fifty thousand dollars (inclusive of the cost of the site of the same),—seven hundred thousand dollars; and the Act of March 12, 1872, authorizing the purchase of a site therefor, is hereby so amended as to limit the cost of the site to a sum not exceeding five hundred thousand dollars."

And in the subsequent Appropriation Act of March 3, 1873, 17 Stat. 523, a further provision was inserted as follows:—

"For purchase of site for the building for custom-house and post-office at Cincinnati, Ohio, seven hundred and fifty thousand dollars."

an attempt to enforce a legal right and is a suit at law within the jurisdiction of the Judiciary Act of

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Mr. E. W. Kittredge, for plaintiffs in error.

Mr. Assistant Attorney-General Edwin B. Smith. contra.

MR. JUSTICE STRONG delivered the opinion of the court.

It has not been seriously contended during the argument that the United States government is without power to appropriate lands or other property within the States for its own uses, and to enable it to perform its proper functions. Such an authority is essential to its independent existence and perpetuity. These cannot be preserved if the obstinacy of a private person, or if any other authority, can prevent the acquisition of the means or instruments by which alone governmental functions can be performed. The powers vested by the Constitution in the general government demand for their exercise the acquisition of lands in all the States. These are needed for forts, armories, and arsenals, for navy-yards and light-houses, for custom-houses, post-offices, and court-houses, and for other public uses. If the right to acquire property for such uses may be made a barren right by the unwillingness of property-holders to sell, or by the action of a State prohibiting a sale to the Federal government, the constitutional grants of power may be rendered nugatory, and the government is dependent for its practical existence upon the will of a State, or even upon that of a private citizen. This cannot be. No one doubts the existence in the State governments of the right of eminent domain, — a right distinct from and paramount to the right of ultimate ownership. It grows out of the necessities of their being, not out of the tenure by which lands are held. It may be exercised, though the lands are not held by grant from the government, either mediately or immediately, and independent of the consideration whether they would escheat to the government in case of a failure of heirs. The right is the offspring of political necessity; and it is inseparable from sovereignty, unless denied to it by its fundamental law. *Vattel*, c. 20, § 34; *Bynk.*, lib. 2, c. 15; *Kent's Com.* 338-340; *Cooley on Const. Lim.* 584 *et seq.* But it is no more necessary for the exercise of the powers of a State government than it is for the exercise of the conceded powers of the Federal government. That government is as sovereign within its sphere as the States are within theirs. True, its sphere is limited. Certain subjects only are committed to it; but its power over those subjects is as full and complete as is the power of the States over the subjects to which their sovereignty extends. The power is not changed by its transfer to another holder.

But, if the right of eminent domain exists in the Federal government, it is a right which may be exercised within the States, so far as is necessary to the enjoyment of the powers conferred upon it by the Constitution. In *Ableman v. Booth*, 21 How. 523, Chief Justice Taney described in plain language the complex nature of our government, and the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its powers, and each, within its sphere of action prescribed by the Constitution of the United States, independent of the other. Neither is under the necessity of applying to

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the other for permission to exercise its lawful powers. Within its own sphere, it may employ all the agencies for exerting them which are appropriate or necessary, and which are not forbidden by the law of its being. When the power to establish post-offices and to create courts within the States was conferred upon the Federal government, included in it was authority to obtain sites for such offices and for court-houses, and to obtain them by such means as were known and appropriate. The right of eminent domain was one of those means well known when the Constitution was adopted, and employed to obtain lands for public uses. Its existence, therefore, in the grantee of that power, ought not to be questioned. The Constitution itself contains an implied recognition of it beyond what may justly be implied from the express grants. The fifth amendment contains a provision that private property shall not be taken for public use without just compensation. What is that but an implied assertion, that, on making just compensation, it may be taken? . . . [Here follows a passage from *Cooley*, Const. Limitations.]

We refer also to *Twombly v. Humphrey*, 23 Mich. 471; 10 Pet. 723; *Dickey v. Turnpike Co.*, 7 Dana, 113; *McCullough v. Maryland*, 4 Wheat. 429.

It is true, this power of the Federal government has not heretofore been exercised adversely; but the non-user of a power does not disprove its existence. In some instances, the States, by virtue of their own right of eminent domain, have condemned lands for the use of the general government, and such condemnations have been sustained by their courts, without, however, denying the right of the United States to act independently of the States. Such was the ruling in *Gilmer v. Time Point*, 18 Cal. 229, where lands were condemned by a proceeding in a State court and under a State law for a United States fortification. A similar decision was made in *Burt v. The Merchants' Ins. Co.*, 106 Mass. 356, where land was taken under a State law as a site for a post-office and sub-treasury building. Neither of these cases denies the right of the Federal government to have lands in the States condemned for its uses under its own power and by its own action. The question was, whether the State could take lands for any other public use than that of the State. In *Twombly v. Humphrey*, 23 Mich. 471, a different doctrine was asserted, founded, we think, upon better reason. The proper view of the right of eminent domain seems to be, that it is a right belonging to a sovereignty to take private property for its own public uses, and not for those of another. Beyond that, there exists no necessity; which alone is the foundation of the right. If the United States have the power, it must be complete in itself. It can neither be enlarged nor diminished by a State. Nor can any State prescribe the manner in which it must be exercised. The consent of a State can never be a condition precedent to its enjoyment. Such consent is needed only, if at all, for the transfer of jurisdiction and of the right of exclusive legislation after the land shall have been acquired.

It may, therefore, fairly be concluded that the proceeding in the case

we have in hand was a proceeding by the United States government in its own right, and by virtue of its own eminent domain. The Act of Congress of March 2, 1872, 17 Stat. 39, gave authority to the Secretary of the Treasury to purchase a central and suitable site in the city of Cincinnati, Ohio, for the erection of a building for the accommodation of the United States courts, custom-house, United States depository, post-office, internal-revenue and pension offices, at a cost not exceeding \$300,000; and a proviso to the Act declared that no money should be expended in the purchase until the State of Ohio should cede its jurisdiction over the site, and relinquish to the United States the right to tax the property. The authority here given was to purchase. If that were all, it might be doubted whether the right of eminent domain was intended to be invoked. It is true, the words "to purchase" might be construed as including the power to acquire by condemnation; for, technically, purchase includes all modes of acquisition other than that of descent. But generally, in statutes as in common use, the word is employed in a sense not technical, only as meaning acquisition by contract between the parties, without governmental interference. That Congress intended more than this is evident, however, in view of the subsequent and amendatory Act passed June 10, 1872, which made an appropriation "for the purchase at private sale or by condemnation of the ground for a site" for the building. These provisions, connected as they are, manifest a clear intention to confer upon the Secretary of the Treasury power to acquire the grounds needed by the exercise of the national right of eminent domain, or by private purchase, at his discretion. Why speak of condemnation at all, if Congress had not in view an exercise of the right of eminent domain, and did not intend to confer upon the secretary the right to invoke it?

But it is contended upon behalf of the plaintiffs in error that the Circuit Court had no jurisdiction of the proceeding. There is nothing in the Acts of 1872, it is true, that directs the process by which the contemplated condemnation should be effected, or which expressly authorizes a proceeding in the Circuit Court to secure it. Doubtless Congress might have provided a mode of taking the land, and determining the compensation to be made, which would have been exclusive of all other modes. They might have prescribed in what tribunal or by what agents the taking and the ascertainment of the just compensation should be accomplished. The mode might have been by a commission, or it might have been referred expressly to the Circuit Court; but this, we think, was not necessary. The investment of the Secretary of the Treasury with power to obtain the land by condemnation, without prescribing the mode of exercising the power, gave him also the power to obtain it by any means that were competent to adjudge a condemnation. The Judiciary Act of 1789 conferred upon the circuit courts of the United States jurisdiction of all suits at common law or in equity, when the United States, or any officer thereof, suing under the authority of any Act of Congress, are plaintiffs. If, then, a proceeding to take land

for public uses by condemnation may be a suit at common law, jurisdiction of it is vested in the Circuit Court. That it is a "suit" admits of no question. In *Weston v. Charleston*, 2 Pet. 461, Chief Justice Marshall, speaking for this court, said, "The term [suit] is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy which the law affords. The modes of proceeding may be various; but, if a right is litigated in a court of justice, the proceeding by which the decision of the court is sought is a suit." A writ of prohibition has, therefore, been held to be a suit; so has a writ of right, of which the Circuit Court has jurisdiction (*Green v. Lister*, 8 Cranch, 229); so has *habeas corpus*. *Holmes v. Jamison*, 14 Pet. 564. When, in the eleventh section of the Judiciary Act of 1789, jurisdiction of suits of a civil nature at common law or in equity was given to the circuit courts, it was intended to embrace not merely suits which the common law recognized as among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined as distinguished from rights in equity, as well as suits in admiralty. The right of eminent domain always was a right at common law. It was not a right in equity, nor was it even the creature of a statute. The time of its exercise may have been prescribed by statute; but the right itself was superior to any statute. That it was not enforced through the agency of a jury is immaterial; for many civil as well as criminal proceedings at common law were without a jury. It is difficult, then, to see why a proceeding to take land in virtue of the government's eminent domain, and determining the compensation to be made for it, is not, within the meaning of the statute, a suit at common law, when initiated in a court. It is an attempt to enforce a legal right. It is quite immaterial that Congress has not enacted that the compensation shall be ascertained in a judicial proceeding. That ascertainment is in its nature at least *quasi* judicial. Certainly no other mode than a judicial trial has been provided.

It is argued that the assessment of property for the purpose of taking it is in its nature like the assessment of its value for the purpose of taxation. It is said they are both valuations of the property to be made as the legislature may prescribe, to enable the government, in the one case, to take the whole of it, and in the other to take a part of it for public uses; and it is argued that no one but Congress could prescribe in either case that the valuation should be made in a judicial tribunal or in a judicial proceeding, although it is admitted that the legislature might authorize the valuation to be thus made in either case. If the supposed analogy be admitted, it proves nothing. Assessments for taxation are specially provided for, and a mode is prescribed. No other is, therefore, admissible. But there is no special provision for ascertaining the just compensation to be made for land taken. That is left to the ordinary processes of the law; and hence, as the government is a suitor for the property under a claim of legal right to take it, there

appears to be no reason for holding that the proper Circuit Court has not jurisdiction of the suit, under the general grant of jurisdiction made by the Act of 1789.

*The judgment of the Circuit Court is affirmed.*¹

[FIELD, J., dissented on certain incidental points.]

IN *Van Brocklin v. Tennessee*, 117 U. S. 151 (1886), GRAY, J., for the court, in deciding that lands, in a State, belonging to the United States, which had been bid in by the United States at auction, in default of payment of direct taxes by the former owner, could not be taxed by the State, commented upon a decision of McLEAN, J., in *U. S. v. R. R. Bridge Co.*, 6 McLean, 517, and said: "The question in issue in that case was not of the State's right of taxation, but of its right of eminent domain for the construction of roads and bridges. The decision of the learned justice in favor of the validity of the exercise of that right by a State over lands of the United States, without the consent of the United States, manifested either by an express Act of Congress or by the assent of a department or officer vested by law with the power of disposing of lands of the United States, appears to have been based upon the theory that the United States can hold land as a private proprietor, for other than public objects, and upon a presumption of the acquiescence of Congress in the State's exercise of the power as tending to increase the value of the lands; and it finds some support in dicta of Mr. Justice Woodbury, in a case in which, however, the exercise of the power by the State was adjudged to be unlawful. *United States v. Chicago*, 7 How. 185, 194, 195. But it can hardly be reconciled with the views expressed by Congress, in Acts concerning particular railroads, too numerous to be cited, as well as in general legislation. Acts of August 4, 1852, ch. 80, March 3, 1855, ch. 200, 10 Stat. 28, 683; July 26, 1866, ch. 262, § 8, 14 Stat. 253; Rev. Stat. § 2477. When that question shall be brought into judgment here, it will require and will receive the careful consideration of the court."²

¹ Compare *Cherokee Nation v. So. Kans. Ry.* 135 U. S. 641, 656, *Twombly v. Humphrey*, 23 Mich. 471 (1871), *In re Sec. Treasury*, 45 Fed. Rep. 396 (U. S. C. C. S. D. N. Y. 1891), *U. S. v. Engeman et al.* 45 Fed. Rep. 546 (U. S. Dist. Ct. E. D. N. Y. 1891) — Ed.

² See *Prop'rs Mt. Hope Cem. v. Boston et al.*, 158 Mass. 509 (1893). — Ed.

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Very likely the Federal govt. could take the state
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in the most serious exigencies.

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THE PEOPLE, EX REL. HERRICK ET AL., v. SMITH.

NEW YORK COURT OF APPEALS. 1860.

[21 N. Y. 595.]

APPEAL from a judgment of the Supreme Court. The relators sued out a *certiorari*, for the purpose of reviewing an order of the county judge of Suffolk County, whereby he reversed an order of the commissioners of highways of the town of Riverhead, — refusing to lay out a highway in that town, pursuant to a petition of twelve freeholders, — and proceeded to lay out such highway. The relators are owners and occupants of a part of the lands through which the highway, so laid out, runs; which lands will have to be appropriated for its track. The single ground of error relied on was, that no notice was served on the relators of the proceedings, on the appeal, or of the hearing before the county judge. The Supreme Court, being of opinion that such notice was not required by law, affirmed the order of the judge, and from this judgment of affirmance the present appeal was taken by the relators. The case was submitted on printed arguments.

Miller & Tuthill, for the appellants.

William Wickham, for the respondent.

DENIO, J. The subject of highways and bridges on Long Island is regulated by a statute passed in 1830, entitled “An Act regulating Highways and Bridges in the Counties of Suffolk, Queen’s and King’s.” (ch. 56.) The system, in its general features, is similar to that established by the Revised Statutes for other parts of the State; but there are some discrepancies, and upon them, I think, the question in the present case may turn. By the Long Island Act, the commissioners have power to lay out new roads without the consent of the owners of the land through which they may run, upon the petition of twelve freeholders of the town, verified by oath or affirmation. (§§ 2, 47.) Nothing is said respecting their giving notice to any one of the hearing of the application before them. Every person conceiving himself aggrieved by a determination of the commissioners, either in laying out, or refusing to lay out, a highway, may appeal to three judges of the Court of Common Pleas. (§ 66.) This jurisdiction is now vested in the county judge under the present Constitution. (Laws, 1847, p. 642, § 27.) Where the determination appealed from is against an application for laying out a road, the judge is to give notice of the time and place of hearing the appeal, to the commissioners by whom such determination was made; and where the commissioners’ determination was in favor of the application, notice is not only to be given to the commissioners, but to one or more of the applicants for the road. (§ 69.) The proofs and allegations of the parties are to be heard, and where the appeal is from an order refusing to lay out a road, the judge shall be taken on not. The necessity for improving the public is not a judicial question and the Legislature had not invest

is to lay it out in the same manner in which commissioners are directed to proceed in like cases. (§§ 71, 74.)

It will thus be seen that the only notice which the statute requires to be given, in a case like the present, is of the time and place of hearing the appeal, and that such notice is only required to be given to the commissioners who made the order appealed from. If the commissioners had been required to give any notice of the hearing before them, then, when the judge came to lay out the road, in consequence of his reversal of the order of the commissioners, he ought to give the same notice, because he is required to proceed, in the performance of that duty, in the same manner in which the commissioners were directed to proceed when the case was before them; but in the absence of any provision for notice of the hearing before the commissioners, no such duty is required of the judge. It follows that, if the relators, as owners and occupants of the land which was to be taken for the road track, were entitled to notice of the hearing before the judge, it is in consequence of some general principle of law, and not because it is required by any provision of the statute. This is the view of the matter taken by the appellant's counsel, for he expressly admits in his printed argument that there is nothing in the Act requiring notice to be given to the land-owners.

The question then is, whether the State, in the exercise of the power to appropriate the property of individuals to a public use, where the duty of judging of the expediency of making the appropriation, in a class of cases, is committed to public officers, is obliged to afford to the owners of the property an opportunity to be heard before those officers when they sit for the purpose of making the determination. I do not speak now of the process for arriving at the amount of compensation to be paid to the owners, but of the determination whether, under the circumstances of a particular case, the property required for the purpose shall be taken or not; and I am of opinion that the State is not under any obligation to make provision for a judicial contest upon that question. The only part of the Constitution which refers to the subject is that which forbids private property to be taken for public use without compensation, and that which prescribes the manner in which the compensation shall be ascertained. It is not pretended that the statute under consideration violates either of these provisions. There is therefore no constitutional injunction on the point under consideration. The necessity for appropriating private property for the use of the public or of the government is not a judicial question. The power resides in the legislature. It may be exercised by means of a statute which shall at once designate the property to be appropriated and the purpose of the appropriation; or it may be delegated to public officers, or, as it has been repeatedly held, to private corporations established to carry on enterprises in which the public are interested. There is no restraint upon the power, except that requiring compensation to be made. And where the power is committed to public officers, it is a subject of legis-

lative discretion to determine what prudential regulations shall be established to secure a discreet and judicious exercise of the authority.

The constitutional provision securing a trial by jury in certain cases, and that which declares that no citizen shall be deprived of his property without due process of law, have no application to the case. The jury trial can only be claimed as a constitutional right where the subject is judicial in its character. The exercise of the right of eminent domain stands on the same ground with the power of taxation. Both are emanations of the law-making power. They are the attributes of political sovereignty, for the exercise of which the legislature is under no necessity to address itself to the courts. In imposing a tax or in appropriating the property of a citizen, or a class of citizens, for a public purpose, with a proper provision for compensation, the legislative act is itself due process of law; though it would not be if it should undertake to appropriate the property of one citizen for the use of another, or to confiscate the property of one person, or a class of persons, or a particular description of property upon some view of public policy, where it could not be said to be taken for a public use. *The People v. The Mayor of Brooklyn*, 4 Comst. 419; *Taylor v. Porter*, 4 Hill, 140; *Wyckhamer v. The People*, 3 Kern. 378.

It follows from these views that it is not necessary for the legislature in the exercise of the right of eminent domain, either directly, or indirectly through public officers or agents, to invest the proceeding with the forms or substance of judicial process. It may allow the owner to intervene and participate in the discussion before the officer or board to whom the power of determining whether the appropriation shall be made in a particular case, or it may provide that the officers shall act upon their own views of propriety and duty without the aid of a forensic contest. The appropriation of the property is an act of public administration, and the form and manner of its performance is such as the legislature shall in its discretion prescribe. In the case before us the Act declares that the judge shall give notice to the commissioners of highways whose order is appealed from, and it is silent as to notice to any other person. The appellants and the commissioners are the only parties who are required to be convened on the hearing before the judge, or to have notice of that hearing, and it is their proofs and allegations only which the judge is obliged to hear. It was doubtless considered that the commissioners, who had officially decided against the Act which the appellants were seeking to promote, would sufficiently represent the views upon that side of the question. But if we should think it was discreet that the land-owners should have been furnished with notice and allowed to participate, still the Act furnishes the rule, and the court has no power to change it.

The counsel for the appellant relies upon the case of *The People v. The Judges of Herkimer*, 20 Wend. 186, where it was held that a written notice of a hearing upon appeal before the judges in a case like the present, which was governed by the Revised Statutes, ought to be

his opinion is a good one in showing the attitude of the
 in dealing with such questions.

given; and the proceedings of the judges were reversed for the want of such a notice. The case illustrates the difference between the general highway law and the system provided for Long Island in this respect. . . . The difference between the cases is, that the Revised Statutes provide for giving the notice, the want of which is here objected to, and the Long Island Act does not. The judgment of the Supreme Court must be affirmed.

All the judges concurring,

*Judgment affirmed.*¹

FAIRCHILD ET AL. v. CITY OF ST. PAUL.

SUPREME COURT OF MINNESOTA, 1891.

[46 Minn. 540.]

APPEAL by plaintiffs, H. S. Fairchild and Greenleaf Clark, from a judgment of the District Court for Ramsey County, where the action (brought to recover \$33,634.50 for quarrying and removing stone from plaintiff's premises and for other trespasses thereon) was tried by KELLY, J.

C. H. Benedict and S. Duffield Mitchell, for appellants. *Daniel W. Lanster and Herman W. Phillips*, for respondent.

MITCHELL, J. This was an action to recover damages for certain alleged acts of trespass in removing stone from the premises of the plaintiffs. The defendant justified the acts on the ground that it had acquired a title to the land for the purposes of a public street. The case was tried upon the theory that its decision depended on the question whether or not the city of St. Paul had acquired a title in fee, and by stipulation it was agreed that the court should determine two questions, *viz.*: First, had the defendant the power and right to condemn the fee of land for street purposes? and, if so, second, had the defendant duly condemned, for such purposes, the fee of the land in question?

1. The main contention of the plaintiffs upon the argument was, to use their own language, "that the public exigencies do not demand the taking and condemnation of the absolute fee-simple title to land for the purpose of highways and streets; that the public wants are supplied by the enjoyment of an easement; and that any act of the legislature which assumes and attempts to authorize a municipality to take and condemn the absolute fee-simple title to land for such purposes is unconstitutional and void." More briefly stated, the proposition is that the legislature cannot authorize the taking of any greater estate in land for public use than is necessary; that an estate in fee is not necessary for the purposes of a street; therefore the legislature cannot authorize the taking of such an estate for such purposes. While we

¹ Compare, as regards taxation, *Spencer v. Merchant*, 125 U. S. 345; s. c. ante, 647 —ED.

that an estate in fee was not necessary for the purposes of a street; and therefore the legislature can not authorize the taking of such an estate for such purposes.

have given the question the careful examination due to the elaborate brief and very earnest argument of the learned counsel, yet it has never seemed to us that there was anything in his contention. In this case it must be conceded that the legislature, if it had the power to do so, has given the city of St. Paul authority to condemn an estate in fee for street purposes; the language of the charter being: "In all cases the land taken and condemned in the manner aforesaid (for streets) shall be vested absolutely in the city of St. Paul in fee-simple." Mun. Code 1884, § 153 (Sp. Laws 1874, p. 59, § 17). There is nothing better settled than that, the power of eminent domain being an incident of sovereignty, the time, manner, and occasion of its exercise are wholly in the control and discretion of the legislature, except as restrained by the Constitution. It rests in the wisdom of the legislature to determine when and in what manner the public necessities require its exercise; and with the reasonableness of the exercise of that discretion the courts will not interfere. *Wilkin v. First Div., etc., R. Co.*, 16 Minn. 244 (271); *Weir v. St. Paul, S. & T. F. R. Co.*, 18 Minn. 139 (155). As the legislature is the sole judge of the public necessity which requires or renders expedient the exercise of the power of eminent domain, so it is the exclusive judge of the amount of land, and of the estate in land, which the public end to be subserved requires shall be taken. The only limitation — at least, the only one applicable to a case like the present — which the Constitution imposes upon the exercise of the right of eminent domain by the legislature is that private property shall not be taken for public use without just compensation therefor first paid or secured. Of course, there is the further limitation, necessarily implied, that the use shall be a public one; upon which question the determination of the legislature is not conclusive upon the courts. But, when the use is public, the necessity or expediency of appropriating any particular property is not a subject of judicial cognizance. Consequently, if in the legislative judgment it is expedient to do so, it has the power expressly to authorize a municipal corporation compulsorily to acquire the absolute fee-simple to lands of private persons condemned for street or any other public purpose. The authorities are so numerous and uniform to this effect that an extended citation of them is unnecessary. See, however, Dill. Mun. Corp. § 589; Cooley, Const. Lim. 688; Lewis, Em. Dom. 277; Elliott, Roads & S. 172; Mills, Em. Dom. §§ 50, 51; *Boom Co. v. Patterson*, 98 U. S. 403, 406; *Sweet v. Buffalo, etc., Ry. Co.*, 79 N. Y. 293, 299.

It is often laid down as the law that the taking of property must always be limited to the necessity of the case, and, consequently, no more can be appropriated in any instance than is needed for the particular use for which the appropriation is made. But it will be found that this is almost invariably said, not in discussing the extent of the power of the legislature, but with reference to the construction of statutes granting authority to exercise the right of eminent domain, and where the authority to take a certain quantity of land or a particular

estate therein depended, not upon an express grant of power to do so, but upon the existence of an alleged necessity, from which the disputed power is to be implied. This distinction is clearly brought out by Justice Cornell in *Milwaukee & St. Paul Ry. Co. v. City of Faribault*, 23 Minn. 167. Upon the principle that statutes conferring compulsory powers to take private property are to be strictly construed, it follows that, when the estate or interest to be taken is not defined by the legislature, only such an estate or interest can be taken as is necessary to accomplish the purpose in view, and, when an easement is sufficient, no greater estate can be taken. It is on this principle that where the legislature has authorized the taking of land for the purposes of streets, without defining the estate that may be taken, or expressly authorizing the taking of the fee, it is held that only an easement can be taken. This is construed, under such statutes, to be the extent of the grant of authority; but no well-considered case can be found which holds that the legislature might not authorize the taking of the fee, if it deemed it expedient.

It is perhaps foreign to the present inquiry to consider the nature and extent of the title which the city of St. Paul acquires in land condemned for street purposes. But, notwithstanding the broad language used in the city charter, we think that it must be construed as only a qualified or terminable fee, — that is, the fee-simple for street purposes, — which gives the city absolute control over the land for those purposes, but that its title is not a proprietary, but what might be termed a sovereign or prerogative, one, which it, as an agency of the State, holds in trust for the public for street purposes, and which it can neither sell nor devote to a private use. . . .

*Judgment affirmed.*¹

IN *Stubbings v. Evanston*, 134 Ill. 37, 41 (1891), in sustaining a ruling that where a part of premises under lease were taken, "the tenant remains bound to pay rent for the whole, according to the terms of the lease," the court (CRAIG, J.) said:

The general rule no doubt is, that eviction of the lessee from the premises by a paramount title will discharge him from the payment of any rent which may fall due, by the terms and conditions of the lease, after eviction. But where a part of leased premises may be taken under the power of eminent domain, can such a taking be regarded as an eviction? Washburn (1 Real Prop. p. 342), in speaking on this subject, says: "It has sometimes been attempted to apply the principle of eviction from a part of the premises, where lands under lease have been appropriated to public use under the exercise of eminent domain. . . . But the better rule, and one believed to be adopted in most of the States, is, that such a taking operates, so far as the lessee is concerned, upon his interest as property, for which the public are to make him compensation, and does not affect his liability to pay rent for the entire estate, according to the terms of his lease, — and this extends to ground rent. Such taking does not abate any part of the rent due."

¹ And so *Dingley v. Boston*, 100 Mass. 544. — Ed.

The lessee holds his term in the same manner as any other owner of real property subject to the right of the public to take

Parks v. City of Boston, 15 Pick. 198, is an interesting case on the question. It was there held: "Where part of a lot of land under lease is taken by the mayor and aldermen of Boston, for the purpose of widening a street, the lease is not thereby extinguished, nor is the lessee discharged from his liability to pay the reserved rent during the residue of the term, but the lessor and lessee are each entitled to recover compensation for the damage so sustained by them, respectively." The same principle was announced in an earlier case, *Ellis v. Welch*, 6 Mass. 216, and in a later case, *Patterson v. City of Boston*, 20 Pick. 159.

In *Foot v. City of Cincinnati*, 11 Ohio, 408, where the leased premises had been appropriated for a street, the Supreme Court held that the lessee was not relieved from the payment of rent, but he was entitled to recover from the city for the damages sustained. See, also, the following cases, where the same principle is announced: *Workman v. Mifflin*, 30 Pa. St. 362; *Frost v. Ernest*, 4 Whart. 86; *Garrison v. City of Chicago*, 7 Bradw. 474.

Under the authorities it seems that a tenant, where a portion of the leased premises is taken, under the power of eminent domain, for the use of the public, cannot, as against his landlord, claim an eviction, and be released from the payment of rent; and as his liability for the payment of rent continues after a part of his term has been taken by the public and appropriated to public use, he would be entitled to recover such damages as he sustained by the taking of his leased property by the public. In other words, the lessee takes and holds his term in the same manner as any other owner of real property holds his title, subject to the right of the public to take a part or the whole of it for public use, at such time as the public necessity may require, upon the payment of just compensation.

In a proceeding to condemn lands for a public purpose, it is not some particular interest which the public seek to take, but the land itself. If A has one estate in the land and B another, in the proceeding to condemn each is entitled to compensation for the land taken, as his interest may appear in the property; and, as said before, if one has a leasehold interest, he may recover damages for such interest and still be held liable for the payment of rent, as that liability existed before the leasehold interest was taken for public use. A different rule has been adopted in some States, particularly in Missouri. *Biddle v. Hussman*, 23 Mo. 597; *Barclay v. Pickles*, 38 Id. 143. In those cases it was held, that as to the part of the leased premises appropriated to public use the rent was extinguished, and no liability existed against the lessee for such rents. But we think that the weight of authority is the other way, and we are not disposed to adopt a rule of that character.¹

¹ "But upon what principle can it be maintained, that a lessee under such circumstances would be exempted from the payment of the stipulated rent? The lessee takes his term, just as every other owner of real estate takes title, subject to the right and power of the public to take it, or a part of it, for public use, whenever the public

THE BOSTON WATER POWER COMPANY v. THE BOSTON AND WORCESTER RAILROAD CORPORATION ET AL.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1840.

[23 Pick. 360.]

BILL in equity, filed in March, 1833, containing the following allegations.

By St. 1814, c. 39, divers persons were incorporated by the name of the Boston and Roxbury Mill Corporation, and by that statute and those of 1816, c. 40, 1819, c. 65, and 1822, c. 34, the corporation was authorized to purchase and hold real and personal estate; to build a dam from Charles Street, at the westerly end of Beacon Street, in Boston, westerly to Sewall's Point, in Brookline, so as to exclude the tide-water on the northerly side of the dam and form on the southerly side a reservoir or receiving basin of the space between the dam and Boston Neck; to build another dam from Gravelly Point, in Roxbury, to the dam first mentioned, so as to enclose the tide-water within Tide-Mill Creek, on the westerly side of this cross dam;¹ to cut any number of convenient raceways from the full basin to the receiving basin; to maintain and keep up all their works forever; and to lease or sell the right of using the water, upon any terms and in any manner they might think proper; and it was provided, that no other person should have a right to dispose of the water, without the consent of the corporation. The corporation was authorized to make over the main dam first mentioned a good and substantial road, and to receive toll for passing over it. Certain duties and obligations in favor of the public, set forth at large in the bill, were imposed upon the corporation, and certain penalties and forfeitures created to secure the performance of its undertakings. These Acts were accepted by the corporation, whereby

necessity and convenience may require it. Such a right is no incumbrance; such a taking is no breach of the covenant of the lessor for quiet enjoyment.

"The lessee then holds and enjoys exactly what was granted him, as a consideration for the reserved rent; which is, the whole use and beneficial enjoyment of the estate leased, subject to the sovereign right of eminent domain on the part of the public. If he has suffered any loss or diminution in the actual enjoyment of this use, it is not by the act or sufferance of the landlord; but it is by the act of the public, against whom the law has provided him an ample remedy. If he is compelled to pay the full compensation, for the estate actually diminished in value, this is an element in computing the compensation which he is to receive from the public. In this view it becomes unimportant, in settling the principle we are now discussing, whether the taking for public use diminishes the leased premises, little or much, in quantity or in value; all this will be taken into consideration in assessing the damages which the lessee may sustain."—SHAW, C. J., for the court, in *Parks v. Boston*, 15 Pick. 198, 205 (1834). Compare *Scoville v. McMahon*, 62 Conn. 378. — ED.

¹ For a plan of this part of Boston, which elucidates these statements, see 7 Pick. at p. 388. — ED.

a contract conformable to the terms of the Acts was created between the corporation and the Commonwealth.

This contract was performed on the part of the corporation, by the erection of the works required, being works of great magnitude and expense, and of great public convenience and utility; and thereby the corporation became entitled to the exclusive right and privilege of forever using the soil included within the limits of the full basin, for the purpose of keeping it covered with water to the height and extent of surface to which the tide naturally flowed it, and the exclusive right and privilege of forever keeping the soil included within the limits of the receiving basin uncovered by the tide-waters, and using it for a reservoir to receive and carry off the waters flowing from the full basin through the raceways cut, or which should thereafter be cut, through the cross dam, and the exclusive right and privilege of cutting raceways through any part of the cross dam, and of using or disposing, by lease or otherwise, of the water-power thereby created.

The plaintiffs were incorporated by the name of the Boston Water Power Company, on June 12th, 1824 (St. 1824, c. 26), with power to purchase and hold any quantity of the water-power created by the establishment of the dams above mentioned, and by an indenture, dated May 9th, 1832, the Boston and Roxbury Mill Corporation transferred to them, for the sum of 175,000 dollars, all the grantors' right to the land above the main dam, and all the water-power, and all their privileges, contracts, duties, and obligations respecting the water-power; and the plaintiffs thereby, so far as regards the water-power, became entitled to the exclusive right and privilege of forever using the soil included within the two basins, for the purposes before mentioned, and to all the water-power which can be and is created by the constructing and maintaining of the dams, without any hindrance, obstruction, interruption, or diminution of the capacity of the basins respectively.

The plaintiffs allege, that the Boston and Worcester Railroad Corporation deny and disregard these vested rights, and threaten to build a railroad through the full basin, and over the cross dam, and through the receiving basin; and have actually commenced building the same, by driving piles in both of the basins; and have taken for their road a strip of land twenty-six feet wide through the full basin, and five rods wide through the receiving basin.

The construction of the railroad through and across the two basins and cross dam will, it is alleged, greatly diminish the water-power, and abridge the franchise vested in the plaintiffs, of using the soil and space between the main dam and Boston Neck for their basins, to their irreparable injury, and, so far as their rights are concerned, will be a nuisance.

The bill concludes with a prayer for a perpetual injunction and other relief. . . . [The rest of the statement of facts is a recital of the defendants' answer, the substance of which sufficiently appears from the opinion.]

C. G. Loring (with whom were *J. Mason* and *Gardiner*), for the plaintiffs.

Aylwin, and *F. Dexter*, for the defendants.

SHAW, C. J., delivered the opinion of the court. . . . For the purposes of this hearing it is admitted, by the defendants, that the piers, embankments, and bridges erected by them in the construction of the Boston and Worcester Railroad in and over the full and receiving basins claimed by the plaintiffs, do, to a certain extent, diminish the volume of water which those basins would otherwise contain, and do therefore to some extent impair and diminish the water-power to be derived therefrom. But they insist that this is *damnum absque injuria*, that they are legally justified in so laying out the railroad over the basins, that the damage thereby suffered by the plaintiffs is not in consequence of a tort done by the defendants, to be deemed in law or equity a nuisance, or abated as such, but an act done by rightful authority, for which the remedy is by a compensation in damages, to be obtained in the manner provided by law. This, at present, constitutes the question between the parties. This is a question involving public and private interests of very great magnitude, and requiring the most mature consideration. In deciding it, the court have the satisfaction of feeling that they have derived great benefit from a full, able, and ingenious argument, which seems quite to have exhausted the subject.

The first question which we propose to consider is, whether the legislature had the legal and constitutional authority to grant to the corporation created for the purpose of establishing a railroad from Boston to Worcester, the power to lay their road over and across the basins of the plaintiffs, on paying them the damage sustained thereby, and to keep up and maintain the same.

It is contended on the part of the plaintiffs, and this constitutes one of the main grounds of their complaint, that the legislature had no such authority, because they hold a franchise in and over all the lands, flats and waters included in their full and receiving basins, obtained by a grant from the Commonwealth for a valuable consideration, and that the authority contended for by the defendants would constitute an interference with and an encroachment upon their franchise, amounting in substance and effect, to revocation or destruction of the franchise, and a withdrawal of the beneficial uses of the grant. In order to judge of this, it is necessary to consider the nature and origin of the plaintiffs' rights as claimed and set forth by them, and the manner in which they are affected by the acts of the defendants, supposing them warranted by the Act of the Legislature.

We do not now stop to inquire into the objections taken by the defendants, that the plaintiffs have not complied with the conditions of the grants made to them, by the Act incorporating the Boston and Roxbury Mill Corporation, and the several subsequent Acts; that is a subject of separate and distinct consideration. Supposing them to

have complied with those conditions, what are the rights claimed by them? The plaintiffs were authorized to enclose and pen up a portion of the navigable waters adjoining Boston, so as to prevent the ebb and flow of the tide therein, and to discontinue any further use thereof by the public for purposes of navigation, to make use of part of the public domain, being all that part of the land covered by water lying below low-water mark, or more than one hundred rods from high-water mark, and to acquire by purchase or by appraisement, without the consent of the owners, that part of the soil belonging to individuals, and to have the perpetual use thereof for mill purposes, and to make a highway on their dams and take toll thereon. Other rights, no doubt, were incident, but this is a summary of their important rights and privileges.

The effect of the authority granted to the railroad corporation to lay their road over these basins, was to some extent to diminish their surface, and reduce their value. But the court are of opinion, that this could in no proper legal sense be considered as annulling or destroying their franchise. They could both stand together. The substance of the plaintiffs' franchise was to be a corporation, to establish a highway and take toll, to establish mills, and to make use of land for mill ponds, derived partly from the public and partly from individuals, either by purchase or by taking it, for public use, at an appraisement, by authority of the legislature. So far as this gave them a right to the use of land, it constituted an interest and qualified property in the land, not larger or more ample, or of any different nature, from a grant of land in fee, and did not necessarily withdraw it from a liability to which all the lands of the Commonwealth are subject, to be taken for public use, at an equivalent, when in the opinion of the legislature, the public exigency, or as it is expressed in case of highways, when public convenience and necessity may require it. The plaintiffs still retain their franchise, they still retain all their rights derived from the legislative grants, and the only effect of the subsequent Acts is to appropriate, to another and distinct public use, a portion of the land over which their franchise was to be used. We cannot perceive how it differs from the case of a turnpike or canal. Suppose a broad canal extends across a large part of the State. The proprietors have a franchise similar to that of the plaintiffs, to use the soil in which the bed of the canal is formed, and it is, in the same manner, derived by a grant from the legislature. It is a franchise. But if afterwards it becomes necessary to lay a turnpike, or a public highway across it, would this be a disturbance or revocation of the franchise and inconsistent with the power of the legislature in exercising the right of eminent domain, for the public benefit? It might occasion some damage; but that would be a damage to property, and pursuant to the bill of rights, must be compensated for by a fair equivalent. It may be said, that the way might be carried high over the canal, and so not obstruct it. But suppose a railroad, a new erection,

not contemplated when the canal was granted, and from the nature of which, it must be kept on a level, so as to subject the canal proprietors to considerable expense and trouble; whatever other objections might be made to it, it seems to us, that it could not be considered as a revocation, still less an annihilation of the franchise of the proprietors.

If it is suggested, that under this claim of power, the legislature might authorize a new turnpike, canal, or railroad on the same line with a former one to its whole extent, we think the proper answer is, that such a measure would be substantially and in fact, under whatever color or pretence, taking the franchise from one company and giving it to another, in derogation of the first grant, not warranted by the right of eminent domain, and incompatible with the nature of legislative power. In that case the object would be to provide for the public the same public easement, which is already provided for, and secured to the public, by the prior grant, and for which there could be no public exigency. Such a case therefore cannot be presumed.¹

If the whole of a franchise should become necessary for the public use, I am not prepared to say, that the right of eminent domain, in an extreme case, would not extend to and authorize the legislature to take it, on payment of a full equivalent. I am not aware that it stands upon a higher or more sacred ground, than the right to personal or real property. Suppose, for instance, that a bridge had been early granted over navigable waters, say in this harbor, at the place where East Boston ferry now is, and the extension of our foreign commerce, and the exigencies of the United States in maintaining a navy for the defence of the country, should render it manifestly necessary to remove such bridge; I cannot say that it would not be in the power of the legislature to do it, paying an equivalent.

Or suppose, as it has sometimes been suggested, that these dams of the plaintiffs, by checking the tide-waters flowing through the channels below Charles River bridge, and through the harbor of Boston, should have so far altered the regimen of the stream, as gradually to fill up the main channel of the harbor and render it unfit for large ships; suppose it were demonstrated, to the entire satisfaction of all, that this was the cause, that the harbor would become unfit for a naval station, or for commerce, by means of which most extensive damage would ensue to the city, to the Commonwealth, and to the Eastern States (for I mean to put a strong case for illustration), would it not be competent for the legislature to require the dams to be removed, the basins again laid open to the flux and reflux of the tide? I am not prepared to say that it would not, on payment of an equivalent. But it is not necessary to the decision of this cause, to consider such a case, because, as before said, the act of the defendants does not, in any legal sense, annul or destroy the franchise of the plaintiffs.

Nor, in the opinion of the court, is this exercise of power by the

¹ Compare *Greenwood v. Freight Co.* 105 U. S. 13, and 1 Hare, Am Const. Law, 345. — Ed.

legislature, a law impairing the obligation of contracts, within the meaning of the Constitution of the United States. A grant of land is held to be a contract within the meaning of this provision; and such grant cannot be revoked by a State legislature. This was held in regard to the revocation of grants of land by the State of Georgia. *Fletcher v. Peck*, 6 Cranch, 87. And yet there can be no doubt, that land granted by the government, as well as any other land, may be taken by the legislature in the exercise of the right of eminent domain, on payment of an equivalent. Such an appropriation therefore is not a violation of the contract by which property, or rights in the nature of property, and which may be compensated for in damages, are granted by the government to individuals.

The right by which individuals owning mills are enabled to flow the lands of proprietors of meadows is essentially of the same character with that of the plaintiffs, and the main difference is, that the former are obtained by the operation of a general law and the latter by a special act. But in the former case, the mill-owners obtain an easement or franchise, not a property in the soil, and that, without and against the consent of the owners, upon high considerations of public expediency and necessity. But it seems to us, that it cannot be successfully maintained, that a railroad, canal, or turnpike, could not be laid over such a pond, because it would diminish the capacity of the pond, and proportionably lessen the mill-power. *Forward v. Hampshire and Hampden Canal Co.*, 22 Pick. 462.

It is difficult, perhaps impossible, to lay down any general rule, that would precisely define the power of the government, in the exercise of the acknowledged right of eminent domain. It must be large and liberal so as to meet the public exigencies; and it must be so limited and restrained, as to secure effectually the rights of the citizen. It must depend in some measure upon the nature of the exigencies as they arise, and the circumstances of particular cases. In the present case, the court are all of opinion, that the rights of the plaintiffs, in the land of the full and receiving basins, are not of such a character as to exclude the authority of the legislature, from taking a small portion of it, for laying out a railroad, it being for another and distinct public use, not interfering with the franchise of the plaintiffs, in any other way than by occupying such portion of this land.

But it is contended that the Act in question is not valid, inasmuch as it does not provide a compensation for the damage done to the plaintiffs' franchise. We are, however, of opinion, that this objection is founded upon the assumption already considered, *viz.*, that the taking of a portion of the land over which the franchise extends is a taking of their franchise. The Act does not take away the plaintiffs' franchise, but provides for taking part of the land, in which the plaintiffs have a qualified right of property. This is provided for in the first section of the Act of Incorporation, which directs that all damage occasioned to any person or corporation, by the taking of such land or materials, that

is, land five rods wide, for the purposes aforesaid, shall be paid for, by the said corporation, in the manner thereafter provided.

It has been held, that these provisions for taking land, and providing for an indemnity, are remedial and to be construed liberally and beneficially, and will therefore extend to leaseholds, easements, and other interests in land, as well as to land held by complainants in fee. *Ellis v. Welch*, 6 Mass. R. 246; *Parks v. Boston*, 15 Pick. 203.

Another ground much relied upon to show that the Act is unconstitutional and invalid, is, that the Act does not of itself appropriate the specific land taken, to public use, but delegates to the corporation the power of thus taking private property for public use, and therefore, the appropriation, or the right of eminent domain, is not exercised by the competent and proper authority, and that such power cannot be delegated.

This power is certainly one of a high and extraordinary character, and ought to be exercised with great caution and deliberation. This objection deserves and has received great consideration. On the whole, the court are of opinion, that the Act is not open to this objection. Taking the whole Acts of Incorporation together, we are of opinion that it sufficiently declares the public necessity and convenience of a railroad, fixes the *termini*, viz. in or near the city of Boston and thence to any part of Worcester in the county of Worcester, in such manner and form as the corporation shall think most expedient. Nothing therefore is delegated to the corporation, but the power of directing the intermediate course between the *termini*. The question of necessity for public use is passed upon and decided by the legislature. Whether the road goes over the lands of one or another private individual, does not affect that question. So far as the objection is, that the power is delegated to the corporation instead of being exercised by county commissioners, or any other public body, it is rather a question of propriety and fitness, than one of power. In the present case we think that the interests of the corporation and those of the public were so nearly coincident, it being plainly for the advantage of both that the shortest, safest, and cheapest route should be chosen, that the power might be safely intrusted to a corporation thus constituted. This mode of exercising the right of eminent domain is warranted by numerous precedents, both in our own Commonwealth and in most of the other States of the Union.

We are then brought to another and very important inquiry, which is this; supposing the legislature has a full and constitutional authority to pass an Act, empowering the defendants to lay out their railroad over the land used by the plaintiffs, whether they have in fact granted any such power. This must depend upon the construction of the Act of Incorporation. . . .

The court are of opinion, upon the whole case, that the legislature had the constitutional power, to a limited extent, to exercise the right of eminent domain over the lands used by the complainants as their

full and receiving basins, providing in the Act suitable measures for making compensation to the complainants, if they sustained damage thereby; that the Act did make such provision; that the power of the legislature was well executed, in declaring the general purpose and exigency of appropriating private property for public use, by establishing a railroad within certain *termini* expressed, and by granting to a corporation, established and constituted as the defendant corporation was, the power of determining the particular course and direction of the railroad between those *termini*; that the defendants were not restrained, by express words, or any necessary, just, or reasonable implication, from laying out their railroad as they have done, over the basins used by the complainants under their franchise, and therefore, that the averment of the complainants, that the railroad is laid over their basins without any just and lawful authority, and is consequently a nuisance, is not supported.

IN *The West River Bridge Co. v. Dix et al.*, 6 How. 507, 532 (1848), on error, to the Supreme Court of Vermont, it was held that the real estate, easement, and franchise of a bridge corporation, chartered by the State, might be taken by the right of eminent domain. The court (DANIEL, J.) said: "Into all contracts, whether made between States and individuals or between individuals only, there enter conditions which arise not out of the literal terms of the contract itself; they are superinduced by the pre-existing and higher authority of the laws of nature, of nations, or of the community to which the parties belong; they are always presumed, and must be presumed, to be known and recognized by all, are binding upon all, and need never, therefore, be carried into express stipulation, for this could add nothing to their force. Every contract is made in subordination to them, and must yield to their control, as conditions inherent and paramount, wherever a necessity for their execution shall occur. Such a condition is the right of eminent domain. This right does not operate to impair the contract effected by it, but recognizes its obligation in the fullest extent, claiming only the fulfilment of an essential and inseparable condition. Thus, in claiming the resumption or qualification of an investiture, it insists merely on the true nature and character of the right invested. The impairing of contracts inhibited by the Constitution can scarcely, by the greatest violence of construction, be made applicable to the enforcing of the terms or necessary import of a contract; the language and meaning of the inhibition were designed to embrace proceedings attempting the interpolation of some new term or condition foreign to the original agreement, and therefore inconsistent with and violative thereof. It, then, being clear that the power in question not being within the purview of the restriction imposed by the tenth section of the first article of the Constitution, it remains with the States to the full extent in which it inheres in every sovereign government, to be exercised by them in that degree that shall by them be deemed compatible with natural persons. A franchise is property

and nothing more

mensurate with public necessity. So long as they shall steer clear of the single predicament denounced by the Constitution, shall avoid interference with the obligation of contracts, the wisdom, the modes, the policy, the hardship of any exertion of this power are subjects not within the proper cognizance of this court. This is, in truth, purely a question of power; and conceding the power to reside in the State government, this concession would seem to close the door upon all further controversy in connection with it. The instances of the exertion of this power, in some mode or other, from the very foundation of civil government, have been so numerous and familiar, that it seems somewhat strange, at this day, to raise a doubt or question concerning it. In fact, the whole policy of the country, relative to roads, mills, bridges, and canals, rests upon this single power, under which lands have been always condemned; and without the exertion of this power, not one of the improvements just mentioned could be constructed. In our country it is believed that the power was never, or, at any rate, rarely, questioned, until the opinion seems to have obtained that the right of property in a chartered corporation was more sacred and intangible than the same right could possibly be in the person of the citizen; an opinion which must be without any grounds to rest upon, until it can be demonstrated either that the ideal creature is more than a person, or the corporeal being is less. For, as a question of the power to appropriate to public uses the property of private persons, resting upon the ordinary foundations of private right, there would seem to be room neither for doubt nor difficulty. A distinction has been attempted, in argument, between the power of a government to appropriate for public uses property which is corporeal, or may be said to be in being, and the like power in the government to resume or extinguish a franchise. The distinction thus attempted we regard as a refinement which has no foundation in reason, and one that, in truth, avoids the true legal or constitutional question in these causes; namely, that of the right in private persons, in the use or enjoyment of their private property, to control and actually to prohibit the power and duty of the government to advance and protect the general good. We are aware of nothing peculiar to a franchise which can class it higher, or render it more sacred, than other property. A franchise is property, and nothing more."

IN *Boston & Lowell R. R. Corp. v. Salem & Lowell R. R. Co., et al.*, 2 Gray, 1, 35 (1854), after holding that a legislative provision in plaintiffs' charter that no other railroad should be authorized between certain points for thirty years was a valid contract, the court (SHAW, C. J.) said: "But it is earnestly insisted that the grants to the defendant corporations do warrant and justify them in setting up the line of transportation by railroad, by the union of the several sections of their respective railroads; and that it may be regarded as lawfully done, under the right of the government to appropriate private property for public use. It is fully conceded that the right of eminent domain, the

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right of the sovereign, exercised in due form of law, to take private property for public use, when necessity requires it, of which the government must judge, is a right incident to every government, and is often essential to its safety. And property is *nomen generalissimum*, and extends to every species of valuable right and interest, and includes real and personal property, easements, franchises, and incorporeal hereditaments. Even the term 'taking,' which has sometimes been relied upon as implying something tangible or corporeal, is not used in the Massachusetts Declaration of Rights; but the provision is this: 'Whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.' Declaration of Rights, art. 10. Here again the term 'appropriate' is of the largest import, and embraces every mode by which property may be applied to the use of the public. Whatever exists, which public necessity demands, may be thus appropriated. It was held in the Supreme Court of the United States that a franchise to build and maintain a toll bridge might be so appropriated; and that the right of an incorporated company to maintain such a bridge, under a charter from a State, might, under the right of eminent domain, be taken for a highway. *West River Bridge v. Dix*, 6 How. 507. The same point was afterwards decided in the same court in the case of a railroad. *Richmond, Fredericksburg, & Potomac Railroad v. Louisa Railroad*, 13 How. 83. Such appropriation is not regarded as impairing the right of property, or the obligation of any contract; on the contrary, it freely admits such right, and in all just governments provision is made for an adequate compensation, which recognizes the owner's right.

"Nor does it appear to us to make any difference whether the land, or any other right or interest thus appropriated, be derived directly from the government, or acquired otherwise; for the reason already stated, that it does not revoke the grant or annul or impair the contract, but recognizes and admits the validity of both. If, for instance, government, through its authorized agent, had contracted to convey land to an individual, and afterwards, and before the title passed, it should be necessary to appropriate such land to public uses, such taking would not impair the obligation of the contract; the individual would have the same right to compensation for the loss of his equitable title to the land, as he would have had for the land itself if the title to it had passed. If, therefore, in the great advancement of public improvements, in the great changes which take place, in the number of inhabitants, in the number of passengers and quantity of property to be transported, or in great and manifest improvements in the mode of travel and locomotion, it becomes necessary to appropriate, in whole or in part, a franchise previously granted, the existence of which is recognized and admitted, we cannot doubt that it would be competent for the legislature, in clear and express terms, to authorize the appropriation of such franchise, making adequate compensation for the same.

"But we cannot perceive in the Acts of Incorporation of the three defendant corporations, or in any of the Acts in addition thereto, any Act of the government, taking or appropriating any of the rights, franchises, or privileges of the plaintiff corporation under the right of eminent domain. The characteristics of such an Act of appropriation are known and well understood. It must appear that the government intend to exercise this high sovereign right, by clear and express terms, or by necessary implication, leaving no doubt or uncertainty respecting such intent. It must also appear by the Act that they recognize the right of private property, and mean to respect it; and under our Constitution, the Act conferring the power must be accompanied by just and constitutional provisions for full compensation to be made to the owner. If the government authorizes the taking of property, for any use other than a public one, or fails to make provision for a compensation, the Act is simply void; no right of taking as against the owner is conferred; and he has the same rights and remedies against a party acting under such authority, as if it had not existed. In general, therefore, when any Act seems to confer an authority on another to take property, and the grant is not clear and explicit, and no compensation is provided by it, for the owner or party whose rights are injuriously affected, the law will conclude that it was not the intent of the legislature to exercise the right of eminent domain, but simply to confer a right to do the act, or exercise the power given, on first obtaining the consent of those thus affected."

GARDNER v. TRUSTEES OF NEWBURGH. *The Trustees of*

COURT OF CHANCERY OF NEW YORK. 1816. *the village of Newburgh*

[2 Johns. Ch. 162.]

THE bill, which was for an injunction, stated that the plaintiff is owner of a farm, in the village of Newburgh, through which a stream of water has, from time immemorial, run, having its source from a spring in the adjoining farm of the defendant, Hasbrouck, and after entering the plaintiff's land, continues its whole course through his farm until it empties into the Hudson River. That this stream greatly fertilizes his fields, and, running near his house, serves for watering his cattle, and for various domestic and economical purposes. That it supplies water to a brick-yard on the farm of the plaintiff, where most of the bricks used in Newburgh are made; it also supplies a large distillery erected by him at great expense, and a churning-mill, and water for a mill-seat, where the plaintiff is about to erect a mill, for grinding plaster of paris. That the trustees of the village of Newburgh, the defendants, by false representations, obtained an Act of the Legislature,

of land through which the conduit might pass, but nothing as to compensation for the rights of riparianists on the stream that might be taken.

A statute was passed in N.Y. enabling the village of Newburgh to supply the village with gas and water from some water.

passed the 27th of March, 1809, to enable the said trustees to supply the inhabitants of the village with pure and wholesome water. That the trustees applied to the plaintiff for leave to divert the stream, offering him a trifling and very inadequate compensation, which he refused. That the said trustees having obtained leave from the defendant, Hasbrouck, the owner of the spring, to use and divert the water, or a part thereof, that is, a stream one inch and a quarter in diameter, taken from a great elevation, have commenced a conduit and threaten to divert the stream, or a great part thereof, from the plaintiff's farm. That the plaintiff is apprehensive that if this is done, there will not, in a dry season, be water sufficient even for his cattle, etc. The plaintiff, therefore, prayed an injunction to prevent the defendants from diverting the water, etc. The bill was sworn to, and the plaintiff produced several affidavits, which stated that the stream was not more than sufficient for the distillery, brick-yard, etc., of the plaintiff, and if diverted through a pipe, or tube, of the proposed diameter, would greatly injure, if not render the works useless. One of the affidavits stated that the whole stream would pass through a tube of one inch diameter, with a head of five feet.

Burr and J. V. N. Yates, for the plaintiff.

THE CHANCELLOR. The statute under which the trustees of the village of Newburgh are proceeding (sess. 32, ch. 119) makes adequate provision for the party injured by the laying of the conduits through his land, and also affords security to the owner of the spring, or springs, from whence the water is to be taken. But there is no provision for making compensation to the plaintiff, through whose land the water issuing from the spring has been accustomed to flow. The bill charges, that the trustees are preparing to divert from the plaintiff's land the whole, or the most part of the stream, for the purpose of supplying the village. The plaintiff's right to the use of the water is as valid in law, and as useful to him as the rights of others who are indemnified or protected by the statute; and he ought not to be deprived of it, and we cannot suppose it was intended he should be deprived of it, without his consent, or without making him a just compensation. The Act is, unintentionally, defective, in not providing for his case, and it ought not to be enforced, and it was not intended to be enforced, until such provision should be made.

It is a clear principle in law, that the owner of land is entitled to the use of a stream of water which has been accustomed, from time immemorial, to flow through it, and the law gives him ample remedy for the violation of this right. To divert or obstruct a water-course is a private nuisance; and the books are full of cases and decisions asserting the right and affording the remedy. (*F. N. B.* 184. *Moore v. Browne*, *Dyer*, 319 b; *Lutterel's Case*, 4 Co. 86; *Glynn v. Nichols*, *Comb.* 43, 2 *Show.* 507; *Prickman v. Trip*, *Comb.* 231.)

The Court of Chancery has also a concurrent jurisdiction, by injunction, equally clear and well established in these cases of private

nuisance. Without noticing nuisances arising from other causes, we have many cases of the application of equity powers on this very subject of diverting streams. In *Finch v. Resbridge* (2 Vern. 390), the Lord Keeper held, that after a long enjoyment of a water-course running to a house and garden, through the ground of another, a right was to be presumed, unless disproved by the other side, and the plaintiff was quieted in his enjoyment, by injunction. So, again, in *Bush v. Western* (Prec. in Ch. 530), a plaintiff who had been in possession, for a long time, of a water-course, was quieted by injunction, against the interruption of the defendant, who had diverted it, though the plaintiff had not established his right at law, and the court said such bills were usual. These cases show the ancient and established jurisdiction of this court; and the foundation of that jurisdiction is the necessity of a preventive remedy when great and immediate mischief, or material injury would arise to the comfort and useful enjoyment of property. The interference rests on the principle of a clear and certain right to the enjoyment of the subject in question, and an injurious interruption of that right which, upon just and equitable grounds, ought to be prevented. (*Anon.* 1 Vern. 120; *East India Company v. Sandys*, 1 Vern. 127; *Hills v. University of Oxford*, 1 Vern. 275; *Anon.* 1 Vesey, 476; *Anon.* 2 Vesey, 414; *Whitchurch v. Hyde*, 2 Atk. 391; 2 Vesey, 453; *Attorney-General v. Nichol*, 16 Vesey, 338).

In the application of the general doctrines of the court to this case, it appears to me to be proper and necessary that the preventive remedy be applied. There is no need, from what at present appears, of sending the plaintiff to law to have his title first established. His right to the use of the stream is one which has been immemorially enjoyed, and of which he is now in the actual possession. The trustees set up no other right to the stream (assuming, for the present, the charges in the bill) than what is derived from the authority of the statute; and if they are suffered to proceed and divert the stream, or the most essential part of it, the plaintiff would receive immediate and great injury, by the suspension of all those works on his land which are set in operation by the water. In addition to this, he will lose the comfort and use of the stream for farming and domestic purposes; and, besides, it must be painful to any one to be deprived, at once, of the enjoyment of a stream which he has been accustomed always to see flowing by the door of his dwelling. A right to a stream of water is as sacred as a right to the soil over which it flows. It is a part of the freehold of which no man can be disseised "but by lawful judgment of his peers, or by due process of law." This is an ancient and fundamental maxim of common right to be found in *magna charta*, and which the legislature has incorporated into an Act declaratory of the rights of the citizens of this State. (Laws, sess. 10, ch. 1.)

I have intimated that the statute does not deprive the plaintiff of the use of the stream, until recompense be made. He would be entitled to his action at law for the interruption of his right, and all his remedies

Th. thinks the proper method of the decision very good. The case has often been cited for more than it decides. The legislature had not provided for taking such action.

at law, and in this court, remain equally in force. But I am not to be understood as denying a competent power in the legislature to take private property for necessary or useful public purposes; and, perhaps, even for the purposes specified in the Act on which this case arises. But to render the exercise of the power valid, a fair compensation must, in all cases, be previously made to the individuals affected, under some equitable assessment to be provided by law. This is a necessary qualification accompanying the exercise of legislative power, in taking private property for public uses; the limitation is admitted by the soundest authorities, and is adopted by all temperate and civilized governments, from a deep and universal sense of its justice.

Grotius (De Jur. B. & P. b. 8, ch. 14, s. 7),¹ Puffendorf (De Jur. Nat. et Gent. b. 8, ch. 5, s. 7), and Bynkershoeck (Quæst. Jur. Pub. b. 2, ch. 15), when speaking of the eminent domain of the sovereign, admit that private property may be taken for public uses, when public necessity or utility require it; but they all lay it down as a clear principle of natural equity, that the individual whose property is thus sacrificed, must be indemnified. The last of those jurists insists, that private property cannot be taken, on any terms, without consent of the owner, for purposes of public ornament or pleasure; and, he mentions an instance in which the Roman Senate refused to allow the prætors to carry an aqueduct through the farm of an individual, against his consent, when intended merely for ornament. The sense and practice of the English government are equally explicit on this point. Private property cannot be violated in any case, or by any set of men, or for any public purpose, without the interposition of the legislature. And how does the legislature interpose and compel? . . . [Here follows a passage from 1 Bl. Com. 139. See *supra*, p. 952.]

I may go further, and show that this inviolability of private property, even as it respects the acts and the wants of the State, unless a just indemnity be afforded, has excited so much interest, and been deemed of such importance, that it has frequently been made the subject of an express and fundamental article of right in the constitution of govern-

¹ This citation should be Book ii. c. 14, s. 7. The treatise has but three books. Chapter fourteen relates to the promises and contracts of kings. After speaking of the sense in which they may be said to incur obligations to their subjects, the author goes on, in section 7, thus: "VII. Sed hoc quoque sciendum est, posse subditis jus etiam quæsitum auferri per regem duplici modo, aut in pœnam, aut ex vi supereminentis domini. Aut id fiat ex vi supereminentis domini, primum requiritur utilitas publica; deinde, ut si fieri potest compensatio fiat ei qui suum amisit, ex communi. Hoc ergo si in rebus aliis locum habet, ita et in jure quod ex promisso aut contractu quaritur."

In Whewell's translation the passage is given thus: "This also is to be noted, that a right, even when it has been acquired by subjects, may be taken away by the king in two modes; either as a Penalty, or by the force of Eminent Dominion. But to do this by the force of Eminent Dominion, there is required, in the first place, public utility; and next, that, if possible, compensation be made to him who has lost what was his, at the common expense. And as this holds with regard to other matters, so does it with regard to rights which are acquired by promise or contract."

For other passages from Grotius, as well as the other citations in the text, see *supra*, pp. 946-950. — Ed.

making provision for compensation. One after finds in existing day statements that compensation must

ment. Such an article is to be seen in the bill of rights annexed to the constitutions of the States of Pennsylvania, Delaware, and Ohio; and it has been incorporated in some of the written constitutions adopted in Europe (Constitutional charter of Lewis XVIII. and the ephemeral, but very elaborately drawn, Constitution *de la République Française* of 1795). But what is of higher authority, and is absolutely decisive of the sense of the people of this country, it is made a part of the Constitution of the United States, "that private property shall not be taken for public use, without just compensation." I feel myself, therefore, not only authorized, but bound to conclude, that a provision for compensation is an indispensable attendant on the due and constitutional exercise of the power of depriving an individual of his property; and I am persuaded that the legislature never intended, by the Act in question, to violate or interfere with this great and sacred principle of private right. This is evident from the care which this Act bestows on the rights of the owners of the spring, and of the lands through which the conduits are to pass. These are the only cases in which the legislature contemplated or intended that the Act could or should interfere with private right, and in these cases due provision is made for its protection, or for compensation. There is no reason why the rights of the plaintiff should not have the same protection as the rights of his neighbors, and the necessity of a provision for his case could not have occurred, or it, doubtless, would have been inserted. Until, then, some provision be made for affording him compensation, it would be unjust, and contrary to the first principles of government, and equally contrary to the intention of this statute, to take from the plaintiff his undoubted and prescriptive right to the use and enjoyment of the stream of water. . . .

I shall, accordingly, upon the facts charged in the bill, and supported by affidavits, as a measure immediately necessary to prevent impending injury, allow the injunction, and wait for the answer, to see whether the merits of the case will be varied.

*Injunction granted.*¹

¹ Compare Chancellor Kent, in 1832 (1 Kent's Com. *447): "The principle in the English government, that the Parliament is omnipotent, does not prevail in the United States; though, if there be no constitutional objection to a statute, it is with us as absolute and uncontrollable as laws flowing from the sovereign power under any other form of government." See *ante*, p. 165, note.

This case and that of *Sinnickson v. Johnson* (*infra*, p. 986), are sometimes referred to as if they judicially held that in a State where the Constitution is silent, the courts can disregard a legislative Act which plainly and indisputably takes private property for public purposes, without providing for compensation. Neither case so holds. In *Gardner v. Newburgh*, the statute was not set aside; but its true construction was declared, and the defendants were enjoined from violating it. This construction was reached on the ground, first, that other parts of the statute indicated the intention to be what is now laid down; and, second, that the contrary view would impute to the legislature what would be "unjust and contrary to the first principles of government." This method, in constitutional questions, that of construction, is one on which courts may travel far; and they do and should. Compare *Note to Parton's Case*, *ante*, p. 48, *DOE, J.*, in *Orr v. Quimby*, 54 N. H. 647, and *Com. v. Lehigh, &c. Co.*, 29 Atl. Rep. 664, 665 (Pa. July, 1894). — ED.

ROGERS v. BRADSHAW.

See p. 1180

NEW YORK COURT OF ERRORS. 1823.

[20 Johns. 735.¹]*S. Young* and *H. Bleecker*, for the plaintiffs in error.*A. Van Vechten*, for the defendant in error.

The CHANCELLOR [KENT]. This case came before the Supreme Court upon *certiorari*, founded on a justice's judgment.

It appeared by the return of the justice, that Bradshaw sued Rogers and Magee, in trespass, for entering, in June, 1821, upon his land, and cutting down timber. They justified under the several Acts relative to the canals. It was shown in proof, that the route of the northern canal, at the place in question, was directed by the chief engineer; that the turnpike road adjoining the place where the trespass was alleged to have been committed, was unavoidably encroached on by the tract or course of the canal, and that another road was indispensable at that place, and must have been made before the canal was commenced; that the land on which the entry was made, was a necessary, if not the only course for the road, and was the least expensive, and best for the accommodation of the public; the chief engineer approved of the road as staked out, and it was staked out by his direction, and was in length about forty-two rods, and in width four rods; and the two defendants, under the authority of the canal commissioners, and in pursuance of a contract with one of them, were putting the ground in the form of a turnpike, when the action of trespass was brought. The timber and wood cut down were supposed to have been worth from twenty to forty dollars. Upon these facts, the justice held the justification valid, and gave judgment for the defendants.

The Supreme Court reversed the judgment of the justice; and in the opinion delivered by the Chief Justice in behalf of the court, it was stated, that the land of Bradshaw was not entered upon for the prosecution of canal improvements, but was taken as a substitute for part of the turnpike road, which had been broken up and taken for the canal, and therefore the case did not come within the powers given to the canal commissioners by the Act of 1817. It was further stated, that the case did not come within the powers granted by the Act of 1820, because a turnpike was not a public road or highway, within the meaning of the Act, and because the Act contained no provision for compensation to the owner of the land so taken. . . .

According to my view, then, of the case, the Supreme Court were mistaken when they held, that the Act of 1817 did not apply to the case, on the ground that the land of the defendant in error had not been entered upon for the prosecution of the canal improvements. I

¹ The statement of facts is omitted. — Ed.

apprehend, they were equally in an error when they held, that under the subsequent Act of 1820, the proceedings were indefensible. . . .

It appears to me to be a sufficient answer to this objection, that the Act of 1817 had provided the remedy for compensation for every injury committed by the commissioners in the execution of their powers; and when new powers are added (though, I apprehend, the Act of 1820 did not, on this point, confer any power not before existing), the same remedy would apply. . . .

If the remedy given in 1817 did not extend to lands appropriated under the powers mentioned in the latter Act, yet I should doubt exceedingly, whether the general principle, that private property is not to be taken for public uses without just compensation, is to be carried so far as to make a public officer who enters upon private property by virtue of legislative authority, specially given for a public purpose, a trespasser, if he enters before the property has been paid for. I do not know, nor do I find, that the precedents will justify any court of justice in carrying the general principle to such an extent. The Supreme Court, in one part of their opinion, admit, that the canal commissioners have a right to enter upon, and occupy lands, necessary to effectuate the objects of their appointment, without having first paid the loss and damage the proprietor of lands may sustain. This equitable and constitutional title to compensation, undoubtedly, imposes it as an absolute duty upon the legislature to make provision for compensation, whenever they authorize an interference with private right. Perhaps, in certain cases, the exercise of the power might be judicially restrained, until an opportunity was given to the party injured to seek and obtain the compensation. But it would deserve a very grave consideration before we undertook to lay down the broad proposition, that notwithstanding a statute clearly and expressly directed the assumption of private property for a necessary public object, it would still be a nullity, and the officer who undertook to execute it a trespasser, if a provision for compensation did not constitute part and parcel of the Act itself. However, it is not necessary to give any opinion on this point, for, as I have already observed, the provision for compensation, in the Act of 1817, extended to cases arising under the Act of 1820.

I am, accordingly, of opinion, that whether the justification of the commissioners be referred to the Act of 1817, or of 1820, it is equally valid and effectual, and that the judgment of the Supreme Court is, consequently, erroneous, and ought to be reversed.

This being the unanimous opinion of the court, it was, thereupon, ordered, adjudged, and decreed, that the judgment of the Supreme Court be reversed, &c., and that the record be remitted, &c.

*Judgment of reversal.*¹

¹ And so *Jerome v. Ross*, 7 Johns. Ch. 315, 344. But see *Randolph, Eminent Domain*, s. 229.

In a case relating to taxation it was said by BREWER, J., for the court, in *Paulsen v. Portland*, 149 U. S. 30, 38 (1892), that, "While not questioning that notice to the

The act would be good so far as preliminary proceedings are concerned (so intimated in the opinion) but perhaps title would not pass until compensation was given, if

SINNICKSON v. JOHNSON ET AL.

NEW JERSEY SUPREME COURT OF JUDICATURE. 1839.

[2 Harrison, 129.]

R. P. Thompson, for plaintiff, W. N. Jeffers, for defendants.

DAYTON, J. The declaration complains of the defendants for an injury done to their meadows by reason of the erection and continuance of a dam over Salem Creek. The defendants plead as a justification, that said dam was erected and continued by virtue of an Act of the Legislature of the State, entitled, "An Act to authorize John Denn, of the county of Salem, to shorten the Navigation of Salem Creek, by cutting a Canal," passed November 6, 1818. All which is set out with proper averments. To this plea, the plaintiff has demurred, and the defendants have filed a joinder. [The statement of the contents of the Act is placed in a note.¹]

tax-payer in some form must be given before an assessment for the construction of a sewer can be sustained, as in any other demand upon the individual for a portion of his property, we do not think it essential to the validity of a section in the charter of a city granting power to construct sewers that there should in terms be expressed either the necessity for or the time or manner of notice. The city is a miniature State, the council is its legislature, the charter is its Constitution; and it is enough if, in that, the power is granted in general terms, for when granted, it must necessarily be exercised subject to all limitations imposed by constitutional provisions, and the power to prescribe the mode of its exercise is, except as restricted, subject to the legislative discretion of the council."

¹ Compare *Davidson v. N O.*, 96 U. S. 97, 105; s. c. *supra*, pp 610, 614 — Ed.

The Act in question (Pamph. L. of 1818, p. 5) enacts substantially as follows: —

Sec. 1. That John Denn be authorized to cut the canal as therein prescribed.

Sec. 2. That the canal shall be cut wholly on the land of said Denn, at least twenty-two feet broad at the top and of sufficient width at the bottom, and depth of water for all vessels navigating said creek; and shall, when cut and opened, be at all times afterward a public highway, and be kept open at least of the depth and width aforesaid, at the sole expense of said Denn, his heirs and assigns.

Sec. 3. That when said Denn shall have completed the canal, as is directed, and obtained a certificate thereof from the Chosen Freeholders of the townships of Man-nington and Lower Penns Neck, or a majority of them, and filed the same in the Clerk's Office of the county of Salem, "it shall and may be lawful for the said John Denn, his heirs and assigns, to build a bridge over the said Salem Creek, for the accom-modation of himself, his heirs and assigns, opposite the mansion house of the said John Denn," provided that the land to be occupied in its construction be his own, and that he do not by its abutments contract the creek so as to injure the navigation; and do put a draw in the same, at least twenty-two feet wide, and that he, his heirs and assigns, maintain said bridge and draw, at their own cost and charges.

Sec. 4. That any person who shall obstruct the digging of the canal, &c., or injure the bridge, &c., shall forfeit one hundred dollars, to said Denn, his heirs and assigns.

Sec. 5. That when the canal shall have been completely finished, and made navigable for vessels as aforesaid, and shall be used and found sufficient for the space of three years after being first used, "it shall and may be lawful for the said Denn, his heirs or assigns, to stop the creek at the place where the said bridge may have been erected;" from which time his liability to maintain the bridge and draw shall cease.

To all the act did not exonerate J. D. and his heirs from the payment of damages to individuals below

The point presented by the demurrer, is this: Does the above Act exonerate John Denn, his heirs and assigns, from the payment of damages done to individuals, by stoppage of the creek? Great care has been used by the legislature, in providing another navigable highway for the public, in lieu of that which was authorized to be stopped up. So, too, the legislature have provided against all damages (which could be anticipated) to private rights. John Denn was to use no one's land but his own, and everything was to be done at his individual expense. But although I think it plain that the legislature never intended to injure private rights, yet the unforeseen result is otherwise. The meadows in question are admitted, by the state of the pleadings, to have been damaged by the stoppage of this creek; and yet the statute which authorizes the Act has not provided compensation for the injury. The constitutionality of the law is not now questioned; but it is insisted that the common law right of the plaintiff to recover damages is in full force. And in this position, I think, the plaintiff is right.

It is a well settled rule, that statutes in derogation of common law rights are to be strictly construed; and we are not to infer that the legislature intended to alter the common law principles, otherwise than is clearly expressed. 11 Mod. 149.

Chancellor Vroom in an opinion delivered in the term of August, 1835, in reference to another branch of the same subject matter, which is now before us, laid down the position distinctly, that the Act in question does not exempt him who does an injury from damages; which opinion, thus far, the counsel contend, is not law.

But the question whether a party who has acted in pursuance of a statute, is protected from damages, where the statute itself is silent, has been before some, at least, of our most respectable State courts. In the case of *Gardner v. The Trustees of Newburgh et al.*, 2 J. C. C. 162, a company had been chartered to supply the town of Newburgh with pure water, but were restrained by injunction from diverting a water-course, as authorized by the statute, until compensation was made to the owners of the land through which it ran, although the Act made no provision for such compensation to them; and Kent, Ch., observed, that the owner of the lands "would be entitled to his action at law, for the interruption of his right, and all his remedies at law, and in that court, remained equally in force."

The case of *Crittenden v. Wilson*, 5 Cowen, 166, is in point. In this case, the court held that the right of the legislature to grant the privilege of making a dam over the Otselic River, which was a public highway, was too clear to be disputed, but the grantee took it subject to the restriction, *sic utere tuo, ut alienum non ledas*. That if no provision for the payment of damages done to individuals, by reason of the dam, had been made by statute, the defendant would still be liable to pay them.

It is true that in *Rogers v. Bradshaw*, 20 J. R. 735, it is intimated that an exception to this rule may exist in the case of public commis-

he injures the rights of his neighbors he is liable to the every other citizen to recover his damages & the amount of the injury.

sioners acting under direction of the statute, as the direct agents of the State in the execution of a great public improvement, and not as volunteers for their own benefit.

In the case of *Stephens v. Proprietors of the Middlesex Canal*, 12 Mass. R. 466, it is said that should the legislature authorize an improvement (as cutting a canal) the execution of which would require or produce the destruction, or diminution of private property, without at the same time giving relief, the owner would undoubtedly have his action at common law for damages.

These authorities would appear to cover and rule the present case. But it was contended by counsel, that they were decided upon their respective States' bills of rights, which declare that private property shall not be taken for public use, without just compensation, and that as our Constitution contains no such limit or restriction, the cases have no application, or in other words that the Legislature of New Jersey being unrestricted by constitutional provisions, is omnipotent, and may take private property for public use, without compensation, whenever it shall will to do so.

The right to take private property for public use does not depend on constitutional provisions, but is one of the attributes of sovereign power; and the Constitution of the United States recognizes it as such, when it says, the right shall not be exercised without just compensation. This power to take private property reaches back of all constituted provisions; and it seems to have been considered a settled principle of universal law, that the right to compensation is an incident to the exercise of that power: that the one is so inseparably connected with the other, that they may be said to exist not as separate and distinct principles, but as parts of one and the same principle. Puffendorf, b. 8, ch. 5, p. 222; 2 Montesquieu, ch. 15, p. 200; Vattel, 112, 113; 1 Black. C. 139; 2 Kent, C. 339, 340; 2 J. C. C. 168; 1 Peter's Com. R. 99, 111; 3 Story's Com. on Constitution, 661; *Bonaparte v. Camden and Amboy Railroad Company*, Bald. R. 220. The language of Judge Baldwin, in the case last cited, is "the obligation" to (make compensation), "attaches to the exercise of the power" (to take the property), "though it is not provided for by the State Constitution, or that of the United States had not enjoined it."

And Story calls the provision on this subject, in the Constitution of the United States, merely "an affirmation of a great doctrine established by the common law." This principle of public law has been made, by express enactment, a part of the Constitution of the United States (*vide* 5th Amendment), but it has been decided that as a constitutional provision, it does not apply to the several States. *Barron v. Mayor of Baltimore*, 7 Peters, 247; *Livingston's Lessee v. Moore*, 7 Peters, 551, 552. Still if the opinions of the above distinguished jurists be correct, it is operative as a principle of universal law; and the legislature of this State can no more take private property for public use, without just compensation, than if this restraining principle were incor-

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porated into, and made part of its State Constitution. I have felt it a duty to notice this point, thus far, because of its interest and importance in the abstract, and of the great reliance placed upon it in the argument of the counsel, though I scarcely considered it necessary for the settlement of this case, to pronounce upon it a different opinion.

According to my understanding of the Act in question, the legislature neither intended to take, nor has it taken, private property for public use, in the sense in which these terms are properly to be understood. For the accommodation of John Denn, they authorized him (if he thought proper so to do) to stop up a navigable creek upon condition that he cut a canal at his own expense and upon his own property, as a highway for the public, in lieu of the creek. By the terms of the Act, therefore, I think, the legislature has manifested a clear intent to provide against any interference with private property. It merely agreed to give up its right of passage upon the creek (or in other words, its public property there) for another right of passage equally or more valuable, to be provided by John Denn. The damages which have accrued to the meadow owners have not arisen from cutting the canal, which, in one sense, was for the benefit of the public, but by the stoppage of the creek, which was for the individual benefit, or private emolument of John Denn.

The case therefore is not within the principle laid down in 4 Durn. & E. 796, and *Sutton v. Clark*, 6 Taunt. 29, 41, where it was held that public officers acting under the authority of an Act of Parliament, in repairing public streets, were not answerable for damages, unless they were guilty of an excess of jurisdiction; that the maxim applied, *salus populi, suprema est lex*, and that if no satisfaction were given by the Act of Parliament, the party was without remedy. It is not therefore necessary to inquire whether or not these cases conflict in principle with those already cited. Gibbs, C. J., in *Sutton v. Clark*, carefully distinguishes the case of a public officer who is bound to execute a duty imposed on him by statute, from that of a mere volunteer, who acts not for public purposes, but private emolument. I think it can hardly be pretended, that John Denn stopped Salem Creek for public purposes under any obligatory directions of the statute. So far from this, it is evident on the face of the act, that it was done voluntarily and for his own accommodation. The most that can be said for him is, that by cutting the canal, he paid a consideration to the public, for the privilege of doing so.

The powers given by the Act to John Denn are such only as he would have had, if the creek in question had been his own. He can build his bridge over it, or dam it up, at his pleasure, and his bridge or dam cannot be complained of by the public, as a nuisance; but if in exercising his rights, he damifies the property of his neighbors, he is liable, like every other citizen, to respond in damages to the amount of the injury.

Judgment must be entered for the plaintiff on demurrer, with costs.

NEVINS, J. . . . Upon examining this Act I cannot view it in any other light than a private Act and intended for the benefit of John Denn. . . . Does this Act then confer upon John Denn and his assigns the right to take, injure, or destroy private property, without compensation to the owners? If it does, it is unconstitutional and void, and in violation of natural justice, and therefore would not be a defence to the plaintiff's claim. If it does not confer such right, it constitutes no justification, and the plea cannot therefore be sustained. The legislature are to be considered as conferring nothing but what they had a constitutional right to grant. They could not grant to him the right to overflow the land of the plaintiff or in any other way to injure or destroy it without compensation, and if no such compensation is provided for, the plaintiff has a right to seek his remedy through courts of justice by suit. It is no answer to say that the party injured must or may resort to the justice of the legislature. If such be his only remedy, it is of too vague, indefinite, and uncertain a character to be recognized by courts. The Constitution and laws of this State can never leave the citizen such remedy only, for a clear infringement of his private rights. Nor is it an available argument to say that if the defendants, as the assignees of John Denn, are to respond to the plaintiff in this action for the injury to his property by reason of an act authorized by law, the consequences to them may be ruinous, and the work contemplated by the act, absolutely prevented. Suppose it to be so, may it not be answered that in accepting the grant, they acted voluntarily, and should have foreseen and provided against the consequences, and would it not be equally if not more unjust and oppressive upon the plaintiff to ruin and destroy his property, without the slightest compensation or recompense?

I am of opinion that the plea is no justification to the act complained of, and that the demurrer therefore be sustained.

HORNBLOWER, Ch. J., concurred in sustaining the demurrer. He had not time to prepare a written opinion.

FORD, J., read an opinion sustaining the demurrer.

WHITE, J., was not present at the argument, and gave no opinion.

Judgment for plaintiff, on the demurrer, with costs.

In *Harvey v. Thomas*, 10 Watts, 63, 66 (1840), in holding valid a Pennsylvania statute of May 5, 1832, for the construction of lateral railroads to connect private property with certain public improvements, the court (GIBSON, C. J.) said: "The most material point in the cause is that which involves the constitutionality of the statute on which the defendant's right is founded; but it is one about which little need be said. If there is an appearance of solidity in any part of the argument, it is that the legislature have not power to authorize an application of another's property to a private purpose even on compensation made, because there is no express constitutional affirmance of such a power. But who can point out an express constitutional disaffirmance of it?

public improvements, is valid. The provision in the statute prohibiting the taking of prop. for public purposes without compensation is a disabling and not an enabling

The clause by which it is declared that no man's property shall be taken, or applied to public use, without the consent of his representatives, and without just compensation made, is a disabling, not an enabling one; and the right would have existed in full force without it. Whether the power was only partially restrained for a reason similar to that which induced an ancient lawgiver to annex no penalty to parricide, or whether it was thought there would be no temptation to the act of taking the property of an individual for another's use, it seems clear that there is nothing in the Constitution to prevent it; and the practice of the legislature has been in accordance with the principle, of which the application of another's ground to the purpose of a private way is a pregnant proof. It is true that the title of the owner is not divested by it; but in the language of the Constitution, the ground is nevertheless 'applied' to private use. It is also true, that it has usually, perhaps always, been so applied on compensation made; but this has been done from a sense of justice, and not of constitutional obligation. But as in the case of the statute for compromising the dispute with the Connecticut claimants, under which the property of one man was taken from him and given to another, for the sake of peace, the end to be attained by this lateral railroad law is the public prosperity. Pennsylvania has an incalculable interest in her coal mines; nor will it be alleged that the incorporation of railroad companies, for the development of her resources, in this or any other particular, would not be a measure of public utility; and it surely will not be imagined that a privilege constitutionally given to an artificial person, would be less constitutionally given to a natural one. . . . *Judgment affirmed.*"¹

¹ In affirming this point, in *Hays v. Risher*, 32 Pa. 169, 177, the court (WOODWARD, J.) said. "The truth is, when a lateral railroad is laid upon intervening lands, private property is not taken for private use, and there was no occasion for Judge Gibson's remark in *Harvey v. Thomas*, 10 Watts, 63, that the Constitution does not forbid such taking. The private property is taken for public use—for clear and definite objects of a public nature which are of sufficient importance to attract the sanction of the sovereign. That an individual expects to gain thereby, and has private motives for risking the whole of the necessary investment, and acquires peculiar rights in the work, detracts not a whit from the public aspects of it. The same thing can be said of every railway corporation and of almost every public enterprise."

The statute as to lateral railroads provided that, any owner of land, mills, quarries, coal mines, lime-kilns or other real estate, not over three miles from any railroad, canal, or slack water navigation made by the State or any corporation, who wishes to make a railroad thereto over any intervening land, may enter and survey, and on petitioning the court of common pleas of the county, have six commissioners appointed, and on the report of any four of these that such railroad is necessary and useful "for public or private purposes," and after certain other judicial proceedings, may have a final order authorizing the road. The petitioners are to own the road. Anybody may use it, but only in the proprietors' wagons, at specified rates. The Commonwealth may at any time take the roads on repaying the owners their outlay. *Dunl. Laws Pa.* (ed. 1847) 487.

Compare 6 Am. Law Rev. 197, *Taylor v. Porter et al.*, 4 Hill, 140, 148, NELSON, C. J., dissenting; and many cases holding the laying out of so-called "private roads" constitutional; e. g. *Sherman v. Binck*, 32 Cal. 241 (1867), affirmed in *Monterey Co. v. Cushing*, 83 Cal. 507, 511 (1893), and *Los Angeles Co. v. Reyes*, 32 Pac. Rep. 233 (Cal. Feb. 1893). Compare also *Matter of Split Rock Cable Co.*, 128 N. Y. 403. — Ed.

The public have an interest in it. The building of private roads is for the public welfare. Th. thinks a purely private road would not be justified.

RALEIGH & GASTON RAILROAD COMPANY v. DAVIS.

SUPREME COURT OF NORTH CAROLINA. 1837.

[2 Dev. & Bat. 451.]

THE plaintiffs were incorporated by an Act of the General Assembly passed in December, 1835 (2 Rev. Stat. 299), "for the purpose of effecting a communication by a railroad from some point, in or near the city of Raleigh, to the termination of the Greensville and Roanoke Railroad, at or near Gaston, on the Roanoke River." After providing for the organization of the company, with the usual faculties of pleading and being impleaded, and purchasing and holding estates real and personal, as far as may be necessary for the purposes of the Act, it proceeds in the seventh section, "to invest the president and directors with all the rights and powers necessary for the construction, repair, and maintaining a railroad, to be located as aforesaid, and to make and construct all such works as may be necessary and expedient to the proper completion of the road." By the 12th section, the company have immediately "full power to enter upon all lands through which they may wish to construct the road, to lay out the same," not invading dwelling-houses, etc., and with other restrictions, particularly mentioned. And by the 17th and 21st sections, entry may be made upon the lands thus laid off for the purpose of constructing the road, and upon adjacent lands for the purpose of getting the necessary materials, with a provision in the 22d section for redress by action and double damages, for any wanton or wilful injury to the land, crops, or other property, by an entry for either of these purposes.

To provide for the condemnation of the land thus laid off for the road, or entered upon after having been thus laid off, and also to provide for a compensation to the owner of the land, is the subject of nine sections of the Act — beginning with the 12th and ending with the 20th section. The material provisions of those parts of the Act are, that if the company and the owner of the land cannot agree as to the terms of purchase, the former is authorized, after notice to the owner, to apply to the Court of Pleas and Quarter Sessions, and the court is thereupon required to "appoint five disinterested and impartial freeholders, to assess the damages to the owner from the condemnation of the land for the purpose aforesaid, any three of whom, after being sworn and viewing the premises and hearing such evidence as either party may offer, may ascertain those damages and certify the same" in a form given in the Act: and in making the assessment, "they shall consider the proprietor of the land as the owner of the whole fee-simple interest therein, and take into consideration the quality and quantity of the land condemned, the additional fencing that will be required thereby, and all the inconveniences that will result to the proprietor from the condemnation thereof." The report of the freeholders,

to appraise the land of the commission under the Act, 2d. to take title in fee simple. I was through where land the R.R. was to run, named to assess

when thus made, is to be returned by them forthwith to the court, and "unless some good cause be shown against the report, it shall be confirmed by the court, and entered of record; whereupon, upon payment or tender of the damages," the land reviewed and assessed as aforesaid shall be vested in the Raleigh and Gaston Railroad Company, and they shall be adjudged to hold the same in fee simple, in the same manner as if the proprietor had sold and conveyed it to them. "If the company shall take possession of any land, and fail for forty days to institute proceedings for its condemnation as aforesaid, or shall not prosecute them with diligence, the proprietor of the land may apply to the court to appoint the freeholders with the same duties and powers in all respects as before, and the court shall in like manner affirm or disaffirm the report;" and "when any such report, ascertaining the damages, shall be confirmed, the court shall render judgment in favor of the proprietor for the damages so assessed and double costs, and when the damages and costs shall be satisfied, the title of the land for which such damages are assessed shall be vested in the company in the same manner as if the proprietor had sold and conveyed it to them."

By other parts of the Act, the company is required, under pain of forfeiture, to begin the work within two, and finish it within ten years; and is vested with the exclusive right of transportation on the road, and required to transport all persons and property for certain tolls.

It is a misdemeanor, punishable by fine and imprisonment, to destroy or injure the road, or place any obstruction on it.

By section 25, all machines and vehicles and "all the works of the said company constructed, or property acquired under the authority of the Act, and all profits which shall accrue from the same, shall be vested in the respective stockholders of the company forever, in proportion to their respective shares; and the same shall be deemed personal estate, and shall be exempt from any public charge or tax for fifteen years."

By the last section, "the corporate powers granted by the Act are to enure for ninety years and no longer, unless renewed by competent authority."

The road, as laid out, passes over the land of Mr. Davis, situate in Warren County, and, at November Term, 1836, the company moved the court of that county to appoint five freeholders to make the assessment, according to the Act. Mr. Davis appeared and made known to the court, that he and the company had been unable to agree touching the price to be paid to him for the land sought to be condemned, or touching the compensation for the inconveniences he must be subjected to by the proposed location of the road. And he refused his assent to the mode of proceeding for settling the controversy touching the said price and compensation then and there prosecuted by the company, but objected to the same — first, as a violation of the right of private property secured by the 12th section of the Bill of Rights; and, secondly, as depriving him of the right to a trial by jury, which is made inviolable

provision had no application. The legislature may specify whether the whole or what part of the property was necessary.

by the 14th section of the same instrument. The court, nevertheless, appointed the freeholders, and made the order specifying their duties in the words of the statute. At the next term, three of them returned their report in the form prescribed in the 14th section, together with the certificate of the justice of the peace who administered the oath to them.

The company thereupon moved to confirm the report and have it entered of record; but the other party opposed the motion, and prayed the court to dismiss the proceedings. Upon consideration thereof, the County Court refused the motion of the company, and granted that of Mr. Davis; from which an appeal was prayed, which was also refused, upon the ground that no appeal is given in the charter.

The case was then brought into the Superior Court by a certiorari, and was there heard on the last Spring Circuit, before his Honor JUDGE BAILEY, when the order of the County Court, dismissing the proceedings, was held to be erroneous, and reversed with costs, and a writ of procedendo ordered, commanding the County Court to proceed further in the case according to the said Act of the General Assembly and the law of the land. From that judgment Mr. Davis appealed to this court.

The case was argued at the last term, by *Balger*, for the plaintiffs, and the *Attorney-General* and *W. H. Haywood*, for the defendants. The court continued the case under advisement until the present term, when their opinion was delivered by RUFFIN, CHIEF JUSTICE; who, having stated the case as above, proceeded as follows:—As no objection was made in either of the courts below, that the road was laid out so as to cover more land or in a different form than the charter authorizes; or that the freeholders acted irregularly; or that the damages assessed are not a fair and adequate compensation for the fee-simple of the land taken and all incidental damages, it must be assumed, that there is no ground for exception in either of those respects. The case is therefore to be decided on the specific constitutional objections made on the part of the defendant.

Upon those questions the court had the benefit of a full argument at the last term. The impressions received were then so decided, as to have warranted the delivering of our judgment immediately, if it had been necessary, but as the prosecution of the work conducted by this company could not be impeded by the delay, and some of the points made are novel and of much magnitude, in reference to a class of subjects on which there has been recently and probably will be copious legislation, it seemed discreet, before announcing a decision, to give to the argument, and to the whole subject, the deliberation for which the vacation offered the opportunity.

The right of the public to private property, to the extent that the use of it is needful and advantageous to the public, must, we think, be universally acknowledged. . . . This, too, is not only the right of the nation, constituted by the aggregate body of the people, but it is a

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right and power of government. It was said at the bar, that it was a sovereign right, and therefore remains with the people of this State, since it is not granted in the Constitution. The position, if true, would destroy the value of the power here and dissolve the government. But it seems to the court wholly untenable. It is true the eminent domain is a political and sovereign power; so is every other power vested in, or exercised by, any government. Before a people institute a government, they are themselves necessarily the possessors of all political power which men, by the natural and divine law, can rightfully exercise over each other. But by the constitution of government, the political powers requisite to the existence of government and to the discharge of those functions for which the community created it, are transferred by the people to the government. From the people, the government derives the power to act on and control the people themselves, unless in those points in which the government is restricted by limitations of power. With that exception, the powers of the nation become those of the government, save only that over the constitution of government itself, to abolish or alter it. The government of the United States is an exception to the general principle, from its peculiar construction. To its formation the people of the several States were parties, and they, as the people of several States, have specially delegated to it particular powers for the purpose of making themselves one people, under one government, for particular purposes only. But these incidental powers, derived by a fair, proximate, and natural implication from those enumerated, or from the purposes of forming the Constitution, as declared on its face, have been exercised, and must be yielded. The government of North Carolina, however, is not one of specially delegated powers: it is only one of limited and restricted power.

The Constitution begins by simply "establishing a government for this State," and vests "the legislative power in a Senate and House of Commons." There are no grants of power to the legislature except in a few instances, where the power would not seem naturally to arrange itself under the general class of legislative powers, according to precedent usage, as the election of the Governor and other high officers. It does not even confer the revenue power, nor that of granting the vacant lands; yet the legislature has always exercised both powers, by levying taxes, and by authorizing dispositions of the public domain, although "the right to the unappropriated soil is declared to be, in a free government, one of the essential rights of the collective body of the people," which means nothing more than that it shall not be seized on by any individual or particular class, but shall be kept or disposed of for the common benefit of the whole people. This power, or right of eminent domain, is likewise possessed by the government, and may be exercised by the legislature or under its authority. Unless vested there, it cannot be called into action, and without it neither the government nor the State could hold together. It is peculiarly fit to be wielded by the legislature — it is a power founded on necessity. But it is a neces-

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sity that varies in urgency with a population and production increasing or diminishing, and demanding channels of communication, more or less numerous and improved, and therefore to be exercised according to circumstances, from time to time. The Legislature of North Carolina, when it was a province, and since it became a State, have always exercised it, either directly or through the intervention of the courts that administer the domestic police of the several counties. It is a power which the government is bound to the people to exercise, limited only by a sound discretion as to the number and nature of the roads, and restricted as to the mode of exercising it by the provisions in the Constitution, if any such there be. It is contended that there are such provisions, and that the Act before us is in violation of them in several respects.

It is said — first, that the right of property involves the right to precedent compensation for it, when taken for public use. It is thence deduced as a corollary, that the questions whether the property shall be taken, and what compensation shall be paid for it, do constitute a question at law respecting property, and must be tried by a jury, according to the 14th section of the Bill of Rights.

If the government can lawfully take private property for public use, without compensation, then, confessedly, there is no controversy to be tried by a jury. But the government may prescribe such terms as may be deemed befitting its own character and the justice of the State. So, though there be a constitutional obligation on the government to make compensation, yet if the compensation need not precede the taking of the property, the condemnation of the defendant's land is not illegal, because he may refer to the constitutional mode of ascertaining and enforcing payment of its value and other damages. It behooves the counsel for the defendants, therefore, to establish both parts of the proposition.

The right to compensation, as an absolute and legal right, was contested by the counsel for the plaintiffs, and strenuously asserted on the other side. The court do not decide it, but in this case will assume it to exist as contended on the part of the defendant, though not on all the grounds on which his counsel placed it. The court cannot adopt some of the several distinct sources from which it was derived.

One of them was the Fifth Amendment of the Constitution of the United States, providing that “no person shall be deprived of his life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.” That has always been understood to be a limitation of the power of the Federal government, and not of that of the States. It was authoritatively so held by the Supreme Court of the United States, in *Barron v. The Mayor of Baltimore*, 7 Peters's Rep. 243, which dispenses with further observations from this court.

The natural right and justice of compensation, and the nature of our free institutions, were also relied on as sufficient in themselves to create

the supposed restriction on this power. But the sense of right and wrong varies so much in different individuals, and the principles of what is called natural justice are so uncertain, that they cannot be referred to as a sure standard of constitutional power. It is to the Constitution itself we must look, then, and not merely to its supposed general complexion. There must be words in it which, upon a fair interpretation, and in reference to the subject-matter, and to direct consequences, are incompatible with the enactments of the legislature, before a court can pronounce such enactments null. The principle is, however, so salutary to the citizen, and concerns so nearly the character of the State, that it may well be urged that it must be consecrated by its adoption in some part of the free Constitution of this State. We should be reluctant to pronounce judicially our inability to find it in that instrument. If it be not incorporated therein, the omission must be attributed to the belief of the founders of the government that the legislature would never perpetrate so flagrant an act of gross oppression, or that it would not be tolerated by the people, but be redressed by the next representatives chosen. There is no doubt that, while the legislature and the people of this State expressly restrict the action of the general government on this subject, it must have been supposed by the people that their own local government was in like manner restrained, or would never act in a manner to make such a restraint necessary. There is, however, no clause in that instrument which seems to bear on the point, unless it be that which is relied on in the argument for the defendant. It is the twelfth section of the Bill of Rights, which declares, "that no freeman shall be disseised of his freehold, or deprived of his life, liberty, or property, but by the law of the land." Under the guaranty of this article, it has been held, and in our opinion properly held, that private property is protected from the arbitrary power of transferring it from one person to another. We doubt not that it is also protected from the power of despotic resumption, upon a legislative declaration of forfeiture, or merely to deprive the owner of it, or to enrich the treasury, unless as a pecuniary contribution by way of tax. Such Acts have no foundation in any of the reasons on which depends the power, in virtue of the right of eminent domain, to take private property for the public use, and they could not be sustained by the offer of the fullest compensation. Though not so obvious, it may also be true that the clause under consideration is restrictive of the right of the public to the use of private property, and impliedly forbids it, without compensation. But it is a point on which the court is not disposed, nor at liberty, to give a positive opinion on this occasion. It is not required as a preventive warning against unjust legislation. For it is more inadmissible to suppose that the legislative Acts will be designed to work oppression and wrong than to violate the Constitution directly. It is not deemed probable, and with difficulty conceived to be possible, that the legislature will at any time take the property of the citizen for public use, without at the same time providing some reasonable method of ascertaining a

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just compensation, and some certain means of paying it. Moreover, it is not open to the court to give the definitive opinion demanded, because it does not, in our judgment, necessarily arise here, and it is indecent to decide so grave a question extrajudicially. Here the statute does give compensation fair and liberal, embracing not only the direct, but all incidental and consequential damages. For the purpose of this cause, therefore, it may be taken for granted that compensation is in all cases requisite, as no doubt it will in all cases be made. But with this admission, the court is of opinion that the proposition of the defendant's counsel, as to the mode of ascertaining it, and the period of payment, is not sound.

Unless the compensation must precede the seizure of the property, it is true that in many cases one of the principal securities for it is impaired, and by possibility may be lost, — that of the judicial enforcement of the right. When the property is taken for the public directly, and the payment is to be made out of the treasury, the compensation cannot be made the subject of litigation against the State, but the party must rely on the integrity of the legislature and the general will to have equal right done to all. Yet it seems impossible to lay it down as a principle that compensation is indispensably a condition precedent; and this must be added to the examples already known, in which an injunction of the Constitution cannot be made the subject of judicial cognizance, but finds its only sanction in the understanding and conscience of the legislator. The exigencies of the public may be too urgent to admit of the delay requisite to the simplest mode of previous investigation. In time of war, for example, an army must have food, or ammunition, or quarters, a field for encampment, or an intrenchment for defence, and the necessity is pressing and immediate. Other instances suggest themselves, in which a previous assessment cannot be had with any reasonable hope of doing justice. The Act before us supplies one such in the 21st section. It authorizes an entry into lands adjacent to the road, to cut, quarry, dig, and carry away wood, stone, gravel, or earth for the construction or repair of the road. And for those materials, and for all incidental damages done in taking or carrying them away, reasonable compensation is to be assessed by three freeholders, upon view and on oath. In the like manner, our public road law directs the overseer to cut timber and dig earth for bridges and causeways, and gives the owner a petition to the County Court for adequate compensation, to be fixed by the justices, out of the county funds. Antecedent assessments, in such cases, must be made entirely at a venture, for it is uncertain what quantity of materials will be requisite or can be procured at a particular place, or how many tracks may be broken on the owner's land, and even the weather and season of the year may materially vary the damage. Therefore the Acts must almost necessarily provide for payment for injuries done which can be seen, known, and truly estimated. The compensation to be adequate must be subsequent.

It may be observed that in this we only adopt the established course of legislation and adjudication in that country from which we derive Magna Charta and most of the other free principles declared in our Bill of Rights. The case of *Boyfield v. Porter*, 13 East, 200, is a decision upon a similar Act of Parliament, which confines the owner of the land to the remedy given by the Act. The case is cited with an acknowledgment that it is not an authority upon the question of legislative power in America; for that in England is unquestionably transcendent, and ours is as certainly limited. But when it is recollected with what reverence the great charter has ever been held by both branches of that legislature, and especially by that which is popular; and when, moreover, it is called to mind that the rights of private property have never been more respected than in that country, where it is carried to the extent, perhaps injurious, of successfully opposing great political reforms, and generally prevents the abolition of even a public office without compensation to the incumbent, it may reasonably be inferred that neither the Parliament, nor the courts, nor the people of that country perceived an infraction of the Magna Charta in those statutes. As practical evidence of the true sense of that clause in it, which has been transferred into our Bill of Rights, those legislative and judicial proceedings, though not authority, are entitled to much respect. In a still greater degree does the legislation of our own country, commencing at an early period of our provincial State, and continued up to the present time, upon the subject of laying out roads and making compensation, claim our attention as an authoritative exposition of the general sense, through a long course of time, of the relative rights of the public and of individuals. It establishes or recognizes, on the one hand, the obligations of the public to pay a fair remuneration for injuries to individuals for the public service; but, on the other, it evinces the settled usage, and thence the legality of providing that the compensation may be antecedent, or subsequent to the injury, as the necessities of the public for the property may be immediate or otherwise, and according to the convenience of both parties for truly estimating the amount. In the Constitution of New York is contained an express clause for compensation for private property taken for public use; and it is there settled also that neither the payment nor the assessment need precede the opening of a road over the land of an individual. *Core v. Thompson*, 6 Wendell, 634. Indeed, the principle applies alike to every entry on the land, and would exclude one even for examination and survey, if correct. The court concludes, therefore, that it is competent to the legislature to take private property, for the public use, without a previous or cotemporaneous payment of its value.

If the foregoing reasoning be just to establish the result declared, it seems to go far also to show that it is in the discretion of the legislature to appoint the tribunal by which the compensation shall be assessed. If the obligation on the legislature to make compensation be perfect

and constitutional, it may be competent to the judiciary to declare that the title of the individual was never divested if the legislature were to refuse, or for a long time delay, to make any compensation. Yet, if that which appears to be just, or does not appear to be insufficient, be provided and offered by the legislature, however it may have been fixed on, there is no ground for the interposition of the courts. It is said, if this be true, the party to the controversy nominates the judges to decide, and might, indeed, make the decision directly without a reference to any other person. Perhaps the Act might be found so nearly allied to the judicial functions as to be forbidden to the legislature. If it be not, the court is not aware of anything to prevent a legislative assessment, except propriety and the unfitness of large bodies for the impartial and minute investigations necessary to the justice of such cases. It is not likely that the attempt will ever be made, even in point of form, unless to carry into effect a previous agreement of parties. At all events, it was not done in this instance, but the decision was referred to persons judicially selected, impartial, and acting under oath, with opportunities for full information from evidence and from view. To such a tribunal no objection seems to be furnished by the principles of justice or by the provisions of the Constitution.

It was, however, contended at the bar that it is an evasion of the spirit, if not a violation of the express words, of the fourteenth section of the Bill of Rights, by which, "in all controversies at law respecting property, the ancient mode of trial by jury is to remain sacred and inviolate."

This is a controversy *at law*. Is it also one *respecting property*? In what sense is it so? The necessity for the road between different points is a political question, and not a legal controversy; and it belongs to the legislature. So, also, does the particular line or route of the road, whether it shall or shall not be laid out so as to pass over the lands of particular persons; and that has also been decided by the legislature or referred to scientific engineers. The only subject for the consideration of the jury is, therefore, the quantum of compensation. Reduced to that point, the case of *Smith v. Campbell*, 3 Hawks, 590, is a decision that it is not a controversy "respecting property," within the sense of the Bill of Rights. But the remaining words of the clause yet more clearly exclude this case from its operation. "The ancient mode of trial by jury" is the consecrated institution. This expression has a technical, peculiar, and well-understood sense. It does not import that every legal controversy is to be submitted to and determined by a jury, but that the trial by jury shall remain as it anciently was. Causes may yet be determined on demurrer, and that being an issue of law is determined by the court. Final judgment may also be taken on default, when the whole demand in certainty is thereby admitted; as is provided for actions of debt by the Act of 1777, which was passed by nearly the same persons who composed the Congress of 1776. Interest at a certain rate, fixed by law upon notes as well as bonds, and in

actions of assumpsit, is computed by the clerk; and costs, in all cases, taxed by him. These are all controversies respecting property in the same sense with the present, but they are none of them trials, or cases for trials, by jury. There is no trial of a cause, standing on demurrer or default. Trial refers to a dispute and issue of fact, and not to an issue of law, or inquisition of damages. The terms of this section are with respect to the controversies mentioned in it, analogous to those in the ninth section with respect to criminal prosecutions. That provides that "no freeman shall be convicted of any crime but by the unanimous verdict of a jury." Judgments may be undoubtedly given in indictments on demurrer, on the prisoner's standing mute and refusing to plead, upon submission, and upon *cognovit*. When, therefore, a conviction by verdict is spoken of, it has in view only the case of a plea by the accused and issue on it. That raises a question which can be tried only by jury, and determined against the accused only by the unanimous consent of the jury. "Trial by jury," in civil cases, is equivalent to "conviction by verdict" in criminal proceedings. They do not include, by force of those terms, any case in which there is not an issue of fact. It is the course, both in England and this country, to resort to this favorite Anglo-Saxon mode of determining all legal controversies, as well as trying issues, civil and criminal, where it can be used without great inconvenience. It might have been adopted in this instance, and probably would have been prescribed in the Act, but for the delay, expense, and difficulty of proceeding by writ of *ad quod damnum* on so long a road, passing over the lands of so many proprietors. But it is not indispensable in such a case, because it is not embraced in the words used in the Bill of Rights. Many of the State legislatures, to whose codes we have had access, have proceeded in a similar way; and it has received judicial approbation. In New York, it was held by Chancellor Walworth, in *Beekman v. The Saratoga and Schenectady Railroad*, 3 Paige's Rep. 45, that the ascertaining the damages by commissioners was not repugnant to that part of the Constitution of that State which preserves the trial by jury. In *Livingston v. The Mayor of New York*, 8 Wendell, 85, the same point was ruled unanimously, both in the Supreme Court and in the Court of Errors. In *Livingston v. Moore*, 7 Peters, 469, the distinction upon the words "trial by jury" is explicitly expressed by the Supreme Court of the United States. It arose upon these words in the Constitution of Pennsylvania: "Trial by jury shall remain as heretofore." The court say, "the distinction between trial by jury and inquest of office is so familiar to every mind as to leave no sufficient ground for extending to the latter that inviolability which could have been intended only for the former." In the same light does the subject seem to have been viewed by our legislature in passing a variety of Acts. Not to mention the numerous charters for roads and canals, with provisions similar to that now before us, the first Mill Act and those for partition and others, substitute commissioners for a jury to assess the value in the one case,

and to make the division in the other, with power to charge one lot with money to be paid to the other.

The opinion of the court is, that it was competent to the legislature to adopt the mode it did for the assessment of the damages to the defendant.

It is further objected, that the charter takes more than the right of eminent domain authorizes. It is said that the public is only entitled to the use of private property, leaving the property and right of soil in the proprietors; and that here the whole fee is taken, and not for the public, but for the company, which is but a private corporation.

The doctrine of the common law is, that the public has only an easement in the land over which a road passes, and that the right of soil is undisturbed thereby. The reason is, that ordinarily the interest of the public requires no more. Every beneficial use is included in the easement, in respect, at least, to such highways as existed at the time the principle was adopted, and to which it had reference. But if the use requisite to the public be such an one as requires the whole thing, the same principle which gives to the public the right to any use gives the right to the entire use, upon paying adequate compensation for the whole. It is for the legislature to judge, in cases in which it may be for the public interest to have the use of private property, whether, in fact, the public good requires the property, and to what extent. . . .

Upon the supposition that the legislature may take the property to the public use, it is next said that this taking is not legitimate, because the property is bestowed on private persons. It is true that this is a private corporation, its outlays and emoluments being individual property; but it is constituted to effect a public benefit by means of a road, and that is *publici juris*. In earlier times, there seems to have been a necessity upon governments, or at least it was a settled policy with them, to effect everything of this sort by the direct and sole agency of the government. The highways were made by the public, and the use was accordingly free to the public. The government assumed the exclusive direction as well as authority, as if they chose to be seen and felt in everything, and would avoid even a remote connection between private interests and public institutions. An immense and beneficial revolution has been brought about in modern times by engaging individual enterprise, industry, and economy in the execution of public works of internal improvement. The general management has been left to individuals, whose private interests prompt them to conduct it beneficially to the public; but it is not entirely confided to them. From the nature of their undertaking and the character of the work, they are under sufficient responsibilities to insure the construction and preservation of the work, which is the great object of the government. The public interest and control are neither destroyed nor suspended. The control continues as far as it is consistent with the interests granted, and in all cases as far as may be necessary to the public use. The road is a highway, although the tolls may be private property by force of the grant of the

franchise to collect them. It is a common nuisance to allow it to become ruinous, or to obstruct it. The government may, upon sufficient cause, claim a forfeiture of the charter, or compel the execution and repairs of the road by those undertaking them, by any means applicable to other persons charged with the like duties in respect to other highways. The difference is, that the corporation, in lieu of the sovereign, has the custody and property of the road, and the collection of the tolls in reimbursement of the cost of construction and remuneration for labor and risk of capital. As to the corporation, it is a franchise, like a ferry or any other. As to the public, it is a highway, and in the strictest sense *publici juris*. The land needed for its construction is taken by the public for the public use, and not merely for the private advantage of individuals. It is only vested in the company for the purposes of the Act, — that is, to make the road. This case is, therefore, essentially different from that of *Hoke v. Henderson*, 4 Dev. Rep. 1, which was so much insisted on at the bar. There, the office, a subject of property to a certain extent, was taken from one and vested in another, exactly in the same state and to the same public purposes as it was held by the first. The public interest was in the service of the officer, being precisely the same, with either person for the incumbent. It was, therefore, taken solely for the benefit of the new appointee, which could not be supported. But in this case, the land is taken from the defendant for a public purpose, to which it had not been applied while in his hands. It is taken to be immediately and directly applied to an established public use, under the control and direction of the public authorities, with only such incidental private interests as the legislature has thought proper to admit, as the means of effecting the work and insuring a long preservation of it for the public use.

It is the opinion of the court that no one of the objections is sufficient to arrest the proceeding for condemnation, and that the judgment of the Superior Court must be affirmed. This will be certified to that court, that a writ of *procedendo* may issue thence to the County Court.

PER CURIAM.

*Judgment reversed.*¹

¹ Compare *Bloodgood v. Mohawk, &c. R. R. Co.*, 18 Wend. 9 (1837). — ED.

action by self. a cemetery assn.
for the purpose of taking lands

THE EVERGREEN CEMETERY ASSOCIATION OF NEW
HAVEN v. BEECHER ET AL.

CONNECTICUT SUPREME COURT OF ERRORS. 1885.

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[53 Conn. 551.]

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ACTION by the plaintiff, a cemetery association organized under the laws of the State, for the purpose of taking lands for the enlargement of its territory, under the provision of Gen. Statutes, p. 293, sec. 4; brought to the Superior Court. The defendants demurred to the complaint, and the case was reserved for the advice of this court. The case is sufficiently stated in the opinion.

J. W. Alling and J. H. Webb, for the plaintiff.

S. E. Baldwin and J. H. Whiting, for the defendants. . . .

PARDEE, J. This is a complaint asking leave to take land for cemetery purposes by right of eminent domain. The case has been reserved for our advice.

The plaintiff is the owner of a cemetery, and desires to enlarge it by taking several adjoining pieces of land, each owned by a different person, and has made these owners joint defendants. . . .

The safety of the living requires the burial of the dead in proper time and place; and, inasmuch as it may so happen that no individual may be willing to sell land for such use, of necessity there must remain to the public the right to acquire and use it under such regulations as a proper respect for the memory of the dead and the feelings of survivors demands. In order to secure for burial-places during a period extending indefinitely into the future that degree of care universally demanded, the legislature permits associations to exist with power to discharge in behalf and for the benefit of the public the duty of providing, maintaining, and protecting them. The use of land by them for this purpose does not cease to be a public use because they require varying sums for rights to bury in different localities; not even if the cost of the right is the practical exclusion of some. (Corporations take land by right of eminent domain primarily for the benefit of the public, incidentally for the benefit of themselves.) As a rule, men are not allowed to ride in cars, or pass along turnpikes, or cross toll-bridges, or have grain ground at the mill, without making compensation. One man asks and pays for a single seat in a car; another for a special train; all have rights; each pays in proportion to his use; and some are excluded because of their inability to pay for any use; nevertheless it remains a public use as long as all persons have the same measure of right for the same measure of money.

But it is a matter of common knowledge that there are many cemeteries which are strictly private; in which the public have not, and cannot acquire, the right to bury. Clearly the proprietors of these cannot

to cemeteries may be given the right of em. dom where they discharge the function primarily resting on the govt. still in behalf and for the benefit of the public

have a public use. Why then couldst property be
condemned for the use of a hotel on the same premises?

take land for such continued private use by right of eminent domain. The complaint alleges that the plaintiff is an association duly organized under the laws of this State for the purpose of establishing a burying-ground; that it now owns one; that it desires to enlarge it; and that such enlargement is necessary and proper. There is no allegation that the land which it desires to take for such enlargement is for the public use in the sense indicated in this opinion. 7

Therefore the Superior Court is advised that for the reason that the complaint does not set out any right in the plaintiffs to acquire title to the land of the defendants otherwise than by their voluntary deed, the demurrer must be sustained.

In this opinion the other judges concurred.¹ *Case cited in the note*
the law was held unconstitutional.

BOSTON AND ROXBURY MILL CORPORATION v.
NEWMAN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1832.

[12 Pick. 467.]

[THE statement of facts is omitted. They will appear sufficiently by reference to *The Bost. W. P. Co. v. The Bost. & Wore. R. R. Co.*, *supra*, p. 969.²]

Gorham and C. G. Loring, for the plaintiffs.

Fletcher and D. A. Simmons, for the defendant.

PUTNAM, J., delivered the opinion of the court.³ The plaintiffs claim an easement over the land of the defendant. It is admitted that he owns the fee. The plaintiffs contend that they have acquired a right to use the defendant's land as a receiving basin, into which the water retained in their full basin may flow, for the purpose of working the various mills which they have built and may erect; and that such a right has been acquired in virtue of the grant of the legislature of this Commonwealth, to establish the Boston and Roxbury Mill Corporation. They contend that the "public exigencies require" that the property of the defendant, as well as of divers other owners of flats ground constituting the receiving basin, should be appropriated to enable the corporation to carry their enterprise into effect, which enterprise they say was of public benefit; that the appropriation is within the provision of the 10th article of the Bill of Rights, an appropriation "to

¹ And so *In the Matter of the Deansville Cemetery Assoc.*, 66 N. Y. 569 (1876), and *B'd of Health v. Van Hoesen*, 87 Mich. 533 (1891). Compare *Oury v. Goodwin*, 26 Pac. Rep. 376 (Ariz. 1891), *Prop's Mt. Hope Cem. v. Boston et al.*, 158 Mass. 509 (1893). — Ed.

² See also a plan of this part of Boston in 7 Pick. 388. — Ed.

³ SHAW, C. J., did not sit in the case.

public uses;" and that a reasonable compensation was provided for the owners of the flats ground in and by the Act of Incorporation.

Those positions are denied by the defendant. He contends that the enterprise of the plaintiffs was and is of a private character, and that the legislature had no authority to take or subject the land of the defendant to any incumbrance or service for the benefit of the plaintiffs. And further, that if it were of a public character within the meaning of the Constitution, no reasonable compensation has been provided for the damage sustained by the defendant.

Let us examine these pretensions. And first, was the enterprise of the plaintiffs so far of a public nature as to come within the meaning of the Constitution, and to require the appropriation of the property of the defendant to carry the undertaking of the plaintiffs into effect?

The design was to construct a dam or dams, for the purpose of obtaining a head and fall of the waters of a navigable arm of the sea, whereby to work grist-mills, iron manufactories, and other mills for other useful purposes, and also to make an avenue or highway over the dams, for the accommodation of all persons, cattle, horses and carriages, for a fixed rate of toll.

To effect these objects, the right to obstruct the navigable water or arm of the sea, by the dams, and the right to pen up the tide-water in a full basin, and so to raise a head of water, must be obtained. And the right to exclude the tide-waters from the empty basin, into which the waters of the full basin should run, must also be obtained. The receiving basin would be emptied at low water, and the gates shut against the sea; the pond would be filled by the flow of the tide, and kept in by the gates; and thus a perpetual mill-power of great extent would be acquired. Connected with these water-powers, the dam, or avenue from Beacon Street to Sewall's Point in Brookline, made a prominent subject in the consideration of the enterprise and fixing its character, *viz.*, whether it should be considered as one merely of a private nature, or as one involving great objects of public utility.

The owners of the upland owned the flats ground to the extent of one hundred rods. The Commonwealth had the title to the flats beyond. So far as it regarded the right of the public, it is not contended but that the corporation acquired it by the act of the legislature. But the flats between the upland and those belonging to the Commonwealth must be subjected to the control of the corporation, or they could not carry their undertaking into effect.

Here was a creation of an immense perpetual mill-power, as well as a safe and commodious avenue, in and over the waste waters of the ocean and adjoining to a great city.

We should be at a loss to imagine any undertaking of an individual or association of persons with a view to private emolument, in which the public had a more certain and direct interest and benefit.

It was conceded in the able argument for the defendant, that the toll-bridge or avenue might be sustained, so far as it affected the prop-

erty of individuals, upon the same principles that are applicable to turnpike roads, where the lands of individuals are taken by the road proprietors (with a view indeed to the tolls), because there is a right in the public to pass on the avenue, paying toll, as on a highway. But it is said that the analogy fails, when applied to laying bare the flats, in order to get the water-power for mills, because the public have no right in respect to the manufactories, as they have to travel upon the turnpike roads. But the public may be well said to be paid or compensated in the one as well as in the other case, and are benefited by the one improvement as well as by the other. Take the grist-mill established in this city, as an example. Is it of no benefit to have the corn ground near to the inhabitants, rather than at a distance? "But you cannot compel the miller to grind your corn for the toll, as you may the proprietors of the turnpike to let you travel over the road for a toll." If there be not an actual, there is a moral necessity imposed upon the owner of the mill, to accommodate the public to the extent of his power. Who ever heard of a refusal? And in regard to the manufacturing establishments, is it nothing to the public that great numbers of citizens have the means of employment brought to their homes? and are not the proprietors obliged to give employment? They cannot carry their works on without labor, and who that is disposed to industry and to that kind of employment is prevented from its exercise? This becomes a matter of interest, which will certainly direct and govern the parties. And it is among the most pleasant considerations attending this branch of the subject, that the interest or benefit arising from manufacturing establishments is distributed quite as much, and oftentimes more, among the laborers and operatives, than among the proprietors of the works.

But it is no sure test of the public exigency, that the land-owner shall have a certain right to use the thing thus brought into operation. Take an aqueduct, for example, brought by the enterprise and capital of individuals through lands of others for the use of a city, paying all the damages for the taking of the waters at the spring, and for the digging up of the soil of strangers in order to conduct it. Those strangers have no right to the water thus brought into the city, unless the proprietors of the aqueduct shall permit it. And can it be questioned that the legislature might subject the lands of individuals to the control of the associated proprietors, to obtain such a public benefit? Who could say that the public exigencies did not require individuals to grant the necessary privileges, for a proper compensation, to carry such a work into effect? It would be for the interest of the proprietors to furnish the water at a reasonable price.

The plaintiffs are an authorized association to procure water-power to drive mills of various kinds by tide-waters. How does it differ in principle, from the effecting of such an intent by fresh water, and thereby subjecting the lands of others to the service of the mill-owner? For more than a century the mill-owner has had the right to raise a

Said to be for public use in the case. Stand for a large district of which is a public use. Therefore. within limits. legislative to decide what is for a public use. Question think it will act as this sort of thing just the same.

They can be defended as coming either within the police power or the right of em. dom.

head or pond of water by flowing the lands of others, paying the damage. In many such cases valuable meadows have been inundated, and thus private property has been taken, without the consent of the owners, excepting only as they may be supposed to have consented to the laws made by the legislature. But for those Mill Acts, as they are called, the mill-owner would have been liable for the damages at common law, or the owner of the land might have removed the dam as a private nuisance. But under and in virtue of those Acts, the dam is protected; it is no longer removable as a nuisance; and the owner of the land is thereby deprived of the entire dominion of the soil, because the public good required the sacrifice at his hands, for a reasonable price.

The old statutes speak of mills as greatly beneficial to the public. The preamble of Prov. St. 8 Anne, c. 1, an Act for the upholding and regulating of mills, recites that they sometimes fall into disrepair and are rendered useless and unserviceable, if not totally demolished, to the hurt and detriment of the public, as well as the loss to the partners who are ready to rebuild, etc. So the Prov. St. 12 Anne, c. 8, speaks of "mills serviceable to the public good and the benefit of the town;" and gives to the mill-owners liberty to continue and improve the pond for their best advantage without molestation, paying damages for raising the water, etc. The Prov. St. 1 Geo. II. c. 4, gave treble damages for the trespass of taking up, breaking down, or damnifying any dam made use of for the enclosing of water improved for the benefit of any mill, etc.

These Acts were revised by the St. 1795, c. 74, which provides that the mill-owner may flow any lands not belonging to him (not merely a small quantity, as in the St. 12 Anne), which shall be found necessary to raise a suitable head of water to work his mill, paying damages, etc. The jury however are to determine how far the public convenience and the circumstances of the case do justify such flowing.

The St. 1824, c. 153, provides for the recovery of damages sustained by the owner of the land either above or below the mill. And the St. 1825, c. 109, gives the mill-owner a right of tendering the amount of the damages; thus putting trespass and contract upon the same footing; and it further limits the claim to two years before the process, etc.

Now we have nothing to do with the expediency of those various Mill Acts, but it is certainly apparent, that the legislature have considered it for the public good to encourage the erection of mills, and have subjected the property of the citizens to the control of the mill-owners, they paying the damage. In these cases the damage has been sustained by reason of the flowing of the lands. But in the case at bar, the damage is in laying bare the flats of the tide-water, so as to make a fall for the water in the pond or full basin. But we do not perceive that there is any difference in the principles applicable to the two cases. The object in each is to get a head and fall, for mill purposes. In one case, having a fall, you flow meadows and upland to

get a head ; in the other, having a head, you empty or lay bare the flats to make a fall. In each case a head and fall are obtained for the water power. In each case the mill-owner operates on the lands of other persons, and the damage, it should seem, cannot be greater where the land is made bare, than where it is overflowed. The soil in each case is in the owner, and he may use it in any way which is not inconsistent with the rights granted to the mill-owner. But he may do nothing more ; for we cannot accede to the position of the learned counsel for the defendant, that he has a right to fill up his flats ground, and so to diminish the reservoir. The fallacy, we think, consists in taking it for granted, that the legislature had no authority to make the grant to the corporation, and to subject the lands of the defendant to the service claimed. If it were not necessary thus to affect the property of the defendant for public uses, the argument would be sound ; but if the public exigencies required the appropriation of the defendant's property to the extent defined in the grant to the corporation, they being accountable in damages, then it would seem clearly to follow, that the defendant cannot lawfully do any act or thing which shall counteract the grant. It should be, so far as regards these parties, just as if the defendant had, for a consideration paid, granted to the plaintiffs the right which they now claim under the legislative grant. To recur again to the example of the aqueduct ; — would it be lawful for one through whose lands it has been conducted by the authority of the legislature, and who has been paid his damages, would it be lawful for him to cut off the pipes, under the claim to dig upon his own land to any depth he pleased ?

The principle is, that the lands of individuals are holden subject to the requisitions of the public exigencies, a reasonable compensation being paid for the damage. It is not taking the property of one man and giving it to another. At most, it is a forced sale, to satisfy the pressing want of the public. Now this is as it should be. The will or caprice of an individual would often defeat the most useful and extensive enterprises, if it were otherwise. Property is nevertheless sufficiently guarded by the Constitution. The individual is protected in its enjoyment, saving only when the public want it, not merely for ornamental, but for some necessary and useful purposes. Then indeed the owner must part with it for an equivalent.

It was argued for the defendant, that here was no jury to ascertain the extent to which the plaintiffs might flow, or lay bare the flats. And it seems to us that a jury was altogether unnecessary, because the legislature for themselves, being upon the spot, upon a full view and consideration of the matter, determined and ascertained the extent, as well as the public exigency of the grant.

It has been argued, that the legislature expected the plaintiffs would obtain the consent of the owners of the flats ground. If that were so, and the expectation were not realized, it would become necessary that the legislative power should enable the plaintiffs to effect their enter-

prise. And besides, by providing for damages which might be sustained, the legislature must have contemplated the case which might happen, of a dissent of some persons whose property might be injured.

The contracts which were made between the petitioners and the town of Boston, were ratified by the legislature, as if they had been made by the corporation and the town. But the defendant did not come into any contract with the petitioners or the corporation, affecting his own private property. He is not to be affected by those contracts, in any way, advantageously or injuriously; but he stands upon his own rights as regulated by the law.

It was said that it was not necessary that the plaintiffs should have the whole of the flats, to give effect to the legislative grant; though it seemed to be admitted that the whole was necessary for the completion of the plaintiffs' enterprise. But the grant seems to us to embrace the whole which the plaintiffs claim. They were authorized "effectually to exclude the tide-water, and to form a reservoir or empty basin of the space between the dam [from Charles Street] and Boston Neck." The defendant's land is between those termini.

We are clearly of opinion, that the grant to the Boston and Roxbury Mill Corporation was well warranted by the public exigencies, and that the undertaking, although commenced with a view to the private advantage of the stockholders, promised to be of immense and certain utility to the State. That anticipation has been fully realized, so far as it related to the public. We regret that it did not prove beneficial to the enterprising projectors.

But it is contended, that there was no reasonable compensation provided for the injury which the defendant has sustained.

Let us examine the Act in that respect. By the sixth section it is provided, that any person or corporation sustaining any damage by the building of the dams, etc., "or from the exercise of any of the rights and powers given to the corporation," may have the same ascertained (if there be any), in the first place by a committee to be appointed by the Court of Common Pleas, and if their report should not be satisfactory, then may have the same tried and determined by a jury. The committee are to inquire, "whether any damage has been sustained from the causes aforesaid, and if any, they shall estimate the same, and where the damage is annual they shall so declare the same in their report." It is said by the counsel for the defendant, that this provision was wholly inadequate; that the defendant was benefited by having his land relieved from the tide-water; that there was no present damage, and no provision for damage which should thereafter arise. And it is said further, that the corporation had done no act in taking the defendant's land, so as to enable him to make any claim for damages.

These suggestions are more ingenious than sound. The depriving one of the beneficial use of his lands is, in the sense of the law, a taking of his lands. It would be very clear in the case of flowing. But the principle is the same in laying bare the lands. In each case,

the absolute, unqualified use of the soil is taken away. The owner cannot (as we have seen) counteract the effect of the grant, by filling up his land, in the one case, any more than in the other. He has the fee remaining in him, subject only to the right of the mill-owner to flow, or to lay bare the land, in order to obtain the water-power for mill purposes. When therefore the plaintiffs had built their dams, and excluded the water from the defendant's flats, for an empty basin, there was in one sense a taking of the defendant's land. He thenceforward might claim any damage which he sustained from the diminished right to use his land as he pleased. Before the legislative grant, the defendant might have filled up his flats ground to a certain extent, not interfering with the rights of others. After the grant, he could not lawfully do it. He was deprived of the complete dominion and use which he enjoyed before. If he sustained any damage from that interference with his land, it accrued presently. If it were waste property, and no real injury was sustained, that might well operate with a reasonable man to prevent any claim for damage. The corporation then asserted their right to lay bare the defendant's flats forever. They took the defendant's land for their mill operations, as effectually as the mill-owner upon a fresh-water stream takes the land above by flowing. The mill-owner, in each case, claims an easement in the soil of another. To that extent the owner of the land may claim damage, and a present damage, for any injury or diminution in the value of his estate, which may be redressed in the mode pointed out in the Act of the Legislature.

These views of the case have led us to a clear opinion, that the judgment should be for the plaintiffs, with damages (by consent in such event) at one dollar and full costs of suit.¹

¹ Compare *Olmstead v. Camp*, 33 Conn. 532, 545 (1866), a petition under a statute of 1864, for the right to flood certain land with the mill-pond of a grist-mill. McCURDY, J., for the court, said: "The Constitution declares that 'the property of no person shall be taken for public use without just compensation.' This is indeed a principle of natural law. The decision of the case turns upon the meaning and effect of this provision. The defendant insists that, in favor of private rights, the construction should be strict, and that the term 'public use' means possession, occupation, direct enjoyment, by the public. Or in other words that the property must be literally taken by the public as a body into its direct possession and for its actual use, as in the instances of a State house, a court house, a fort, an arsenal, a park, &c.

"It seems to us that such a limitation of the intent of this important clause would be entirely different from its accepted interpretation, and would prove as unfortunate as novel. One of the most common meanings of the word 'use' as defined by Webster, is 'usefulness, utility, advantage, productive of benefit.' 'Public use' may therefore well mean public usefulness, utility or advantage, or what is productive of general benefit; so that any appropriating of private property by the State under its right of eminent domain for purposes of great advantage to the community, is a taking for public use. Such, it is believed, is the construction which has uniformly been put upon the language by courts, legislatures, and legal authorities. . . .

"The question is asked with great pertinence and propriety, what then is the limit of the legislative power under the clause which we have been considering, and what is the exact line between public and private uses? Our reply is that which has heretofore been quoted. From the nature of the case there can be no precise line. The

HAZEN v. THE ESSEX COMPANY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1853.

[12 *Cush.* 475.]

SHAW, C. J.¹ This is an action of tort at common law, in the nature of an action on the case, for raising a dam across the Merrimack River, by which a mill-stream emptying into that river, above the site of said dam, was set back and overflowed, and a mill of the plaintiff situated thereon, and the mill privilege, were damaged and destroyed. To this declaration the defendants demurred, and the plaintiff joined in demurrer.

The defendant company were chartered by an Act of Incorporation. St. 1845, c. 163. They were incorporated for the purpose of constructing a dam across the Merrimack River, and constructing one or more locks and canals in connection with said dam, to remove obstructions in said river by falls and rapids, and to create a water-power, to be used for mechanical and manufacturing purposes.

The plaintiff states in his declaration that he owns a mill situated in Andover, on a small stream flowing into the river on the south side, half a mile above the place of the defendants' dam, and that he had a right to the use of this stream at the level, at which it naturally flowed, but that the defendants, by color of an Act of March 20, 1845 (the statute above mentioned), erected a dam in the town of Lawrence, within the limits mentioned in said Act, that said river was a navigable river, that by means of said dam, the defendants flowed back the waters on the wheel of the plaintiff's mill, prevented said stream from passing into Merrimack River at its natural height, &c.

power requires a degree of elasticity to be capable of meeting new conditions and improvements and the ever increasing necessities of society. The sole dependence must be on the presumed wisdom of the sovereign authority, supervised, and in cases of gross error or extreme wrong, controlled, by the dispassionate judgment of the courts. In the case of *Fletcher v. Peck*, 6 Cranch, 128, Chief Justice Marshall says: 'The question whether a law is repugnant to the Constitution is at all times a question of great delicacy, which ought seldom if ever to be decided in the affirmative in a doubtful case.' It may be remarked that the justice and propriety of a flowage law is peculiarly a question for legislative rather than judicial determination, although we have briefly discussed the subject on its merits.

"But the defendant claims that, according to the facts found by the court, the use in this particular case is not of a public nature. Upon this point we can entertain no doubt. From the first settlement of the country grist-mills of this description have been in some sense peculiar institutions, invested with a general interest. Towns have procured them to be established and maintained. The State has regulated their tolls. In many instances they have been not merely a convenience, but almost a necessity in the community. . . .

"The report should be accepted and the doings of the committee established."

The reporter adds that, "In this opinion the other judges concurred, except HINMAN, C. J., who dissented."—ED.

¹ BIGELOW, J., did not sit in this case.

*Corp. was created to dam it to create a mill
power. Held to be for a public purpose.*

The demurrer admits all the material facts that are thus set out in the declaration. In general, an Act of Incorporation of this description is held to be a public law, to be taken notice by the court without being specially set out. But independently of that rule, in the present case, the Act of Incorporation is referred to in the declaration, as the authority under color of which the defendants claimed title, and, therefore, its construction and validity are put in issue and brought before the court by the demurrer.

As the owner of land through which a watercourse passes, has a right to the reasonable use of such current as it passes through his land, the plaintiff would have a good right of action, were not the erection of the dam justified by their Act of Incorporation. The defendants maintain that they are so justified, by an Act of the Legislature, exercising, as they may, the sovereign power of the State, in the right of eminent domain, to take and appropriate private property for public use; that the plaintiff's property in the mill and mill privilege was so taken, and that his remedy is by a claim for damages under the Act, and not by action at common law, as for a wrongful and unwarrantable encroachment upon the plaintiff's right of property.

The plaintiff denies this right under the said charter and Act of Incorporation.

1. It is said it was not necessary to take this land and this mill-site of the plaintiff, because within the terms of the Act, the dam might have been placed above the outlet of the particular tributary, and so it was not necessary to flow out the plaintiff's mill. But there is nothing to show that it might have been so placed, without flowing other mills, as much privileged as the plaintiff's, or that it might have been placed so much higher up, with the advantages to navigation and the much larger mill-power of the river, for manufacturing purposes contemplated by the Act.

But we think it is a fallacy to suppose that a mill or mill privilege is, in principle, exempted from being taken under the power of eminent domain over any other private property. An impression of that kind may have arisen from the rule applicable to the general Mill Acts. It stands on a different principle. Thus, each successive proprietor on the watercourse has an equal right to use the power of the stream through his own land, to erect a mill, which is for the general benefit; he, therefore, who first appropriates it by erecting a mill, shall be held secure against the claims of another who has not so appropriated the stream. It would afford no encouragement to the building of mills generally, if one which had been so built, could be superseded and destroyed by any other proprietor who should simply propose to build another mill. This is the sole ground on which, in the administration of the Mill Acts, a mill-proprietor, under a general right to erect and maintain a dam on his own land, although it may flow the land of another, cannot flow a mill already erected. But this principle can have no influence on the legislature, in determining what is necessary

to be taken for public use; the value of a mill can as well be compensated in money, as that of any other property so taken. The case cited, *Springfield v. Connecticut River Railroad Company*, 4 Cush. 63, has no bearing on the present case.

2. It is then contended that if this Act was intended to authorize the defendant company to take the mill-power and mill of the plaintiff, it was void, because it was not taken for public use, and it was not within the power of the government, in the exercise of the right of eminent domain.

This is the main question. In determining it, we must look to the declared purposes of the Act, and if a public use is declared, it will be so held, unless it manifestly appears, by the provisions of the Act, that they can have no tendency to advance and promote such public use. The declared purposes are, to improve the navigation of Merrimack River, and to create a large mill-power for mechanical and manufacturing purposes. In general, whether a particular structure, as a bridge, or a lock, or canal or road, is for the public use, is a question for the legislature, and which may be presumed to have been correctly decided by them. *Commonwealth v. Breed*, 4 Pick. 463. That the improvement of the navigation of a river is done for the public use, has been too frequently decided and acted upon, to require authorities. And so to create a wholly artificial navigation by canals. The establishment of a great mill-power for manufacturing purposes, as an object of great public interest, especially since manufacturing has come to be one of the great public industrial pursuits of the Commonwealth, seems to have been regarded by the legislature and sanctioned by the jurisprudence of the Commonwealth, and, in our judgment, rightly so, in determining what is a public use, justifying the exercise of the right of eminent domain. See St. 1825, c. 148, incorporating the *Salem Mill-Dam Corporation*; *Boston and Roxbury Mill-Dam Corporation v. Newman*, 12 Pick. 467. The Acts since passed, and the cases since decided on this ground, are very numerous. That the erection of this dam would have a strong and direct tendency to advance both these public objects, there is no doubt. We are, therefore, of opinion, that the powers conferred on the corporation by this Act, were so done within the scope of the authority of the legislature, and were not in violation of the Constitution of the Commonwealth.

3. Another objection is taken to this Act, that it provides no adequate means of making compensation to private individuals, for the damage done to their property, by the erection and maintenance of the defendants' dam, and the necessary consequences thereof, in flowing their lands. If it were so, it would certainly be a very serious objection to the validity of the Act. *Chadwick v. Proprietors of Haverhill Bridge*, 2 Dane Ab. 687; *Callender v. Marsh*, 1 Pick. 430. We are, then, to look at the statute, to see whether it is obnoxious to this objection. It is said that compensation for property appropriated, is a common-law right, independent of the declaration of rights. If by

this it is intended to say that compensation in such case is required by a plain dictate of natural justice, it must be conceded. But this right may be regulated, and the remedy made certain and definite by law. The bill of rights declares a great general principle; the particular law prescribes a practical rule, by which the remedy for the violation of right is to be sought and afforded. . . . [It is then held that the statute provides only compensation.]

Demurrer sustained and judgment for the defendants.

G. Minot, for the plaintiff; *E. Merwin*, for the defendants.¹

¹ Compare *Williams v. Nelson*, 23 Pick. 141, *Head v. Amoskeag Man. Co.*, 113 U. S. 9; s. c. *ante*, p. 760, and *Lowell v. Boston*, 111 Mass. 454, 464; s. c. *infra*, p. 1224; *Turner v. Nye*, 154 Mass. 579, s. c. *supra*, p. 893. Compare also *Cury v. Daniels*, 8 Met. 466, 476-478, with *Occum Co. v. Sprague Mfg. Co.*, 35 Conn. 496, and *Elting Woollen Co. v. Williams*, 36 Conn. 310.

See *Holyoke Water-Power Co. v. Conn. Riv. Co.*, 22 Blatchf. C. C. Rep. 131 (1884); s. c. 52 Conn. 570, as to a dam affecting property rights in another State. Compare *Mannville Co. v. Worcester*, 138 Mass. 89. Randolph, *Em. Dom.* ss. 28, 29.

In the *Watuppa Reservoir Co. v. Fall River*, 147 Mass. 548 (1888), it was held that the legislature might appropriate to the use of a city the waters of a "great pond" without providing for compensation to the owners of land on either the pond or its outlet. The court (MORTON, C. J.) said: "Under the ordinance [of 1647] the State owns the great ponds as public property, held in trust for public uses. . . . As this case depends upon the effect of the Colony ordinance, the decisions in England cannot be of assistance to us. They depend upon the common-law, which, as we have said, is changed by the ordinance. The same may be said of the decisions in the other States of this country, most of which are governed by the rules of the common-law. In New York and Pennsylvania, it has been held that the rules of the common law do not apply to such great navigable streams as the Hudson, Mohawk, and Delaware Rivers, though they may not be tidal rivers throughout; that the title of such streams is in the government in trust for the people; and that the State may use the waters, or authorize their use, for the purposes for which they are held in trust, without any compensation to riparian proprietors who are damaged by such use. *People v. Canal Appraisers*, 33 N. Y. 461; *Varick v. Smith*, 9 Paige, 547; *Carson v. Blazer*, 2 Binney, 475; *Shrunk v. Schuylkill Navigation Co.*, 14 S. & R. 71; *Rundle v. Delaware & Raritan Canal Co.*, 14 How. 80.

"The industry of counsel has furnished us with references to between two and three hundred water Acts passed by the legislature, including some in which the right to use the waters of great ponds is granted, in most of which provision is made for compensation to those whose mill privileges or water rights are impaired. These show that the policy of the State has heretofore been to provide such compensation, but they do not show that the State has not the power to use the waters without compensation. The Act we are considering seems to mark a change in the public policy in regard to the waters of the great ponds, as since its enactment several other Acts have been passed containing the same provisions as to damages."

For a good statement of the common-law doctrine, in such a case, apart from the Ordinance of 1647, see *Lord v. Meadville Water Co.*, 135 Penn. 122 (1890). See also *Smith v. Rochester*, 92 N. Y. 463 (1883). For the Ordinance itself, see *supra*, p. 696.

Compare *Wat. Res. Co. v. Fall River*, 154 Mass. 305 (1891). See also "The Watuppa Pond Cases," 2 Harv. Law Rev. 195; "Great Ponds," *Ib.* 316, and "The Law of Ponds," 3 Harv. Law Rev. 1. — Ed.

TALBOT ET AL. v. HUDSON ET AL.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1860.

[16 Gray, 417.]

B. F. Thomas & J. G. Abbott (G. H. Preston with them), for the plaintiffs, and S. H. Phillips (Attorney-General) & J. S. Keyes, for the defendants.

BIGELOW, C. J. This case comes before us for a hearing upon the bill and answer, somewhat out of the regular course of proceedings in chancery. A preliminary injunction was heretofore issued *ex parte* by a justice of this court on the filing of the bill. Upon the return of the subpoena, a motion to dissolve this injunction was made by the defendants. This motion should properly have been heard, in the first instance, by a single judge. But as the case of the plaintiffs, as stated in the bill, mainly depends on the determination of certain questions of law which can in no way be affected by proof, and as the case is one of great importance, involving large interests both of a public and private nature, it was agreed by the parties, with the assent of the court, that these questions should now be heard and finally determined.

The case, so far as is necessary to an understanding of these questions, may be briefly stated thus: The plaintiffs allege that they are owners by purchase of a valuable mill privilege, water rights, and dam, situated in the northern part of the town of Billerica upon the falls of the Concord River, with land in, upon and adjoining the same; that they have erected on said river, at great cost, large mills and other buildings, used and improved by them for the manufacture of various articles; that these mills are carried on and operated by the water power created by said dam and river, and are entirely dependent thereon. They further aver that the defendants, assuming to act as commissioners under and by virtue of the authority conferred by a certain Act of the Legislature, passed on the 4th of April, 1860, entitled "an Act in relation to the flowage of the meadows on Concord and Sudbury rivers," propose to take down and remove said dam to a level thirty-three inches below the top thereof, by which the water power, dam, and mills of the plaintiffs will be destroyed, or rendered of little or no value, and that they will thereby be subjected to serious and irreparable loss, for which the defendants would be unable to recompense them, and of such a nature that they are remediless except by relief in equity. They then aver that said Act of the Legislature is unconstitutional and void, and furnishes no real authority for the threatened action of the defendants as commissioners under its provisions. The defendants, in their answer, admitting that the plaintiffs are owners of the dam, water rights, mill privileges, and mills, as stated by the bill, and alleging their due appointment and qualification to act as commissioners under the Act of the Legislature aforesaid, aver, among other things, that said Act is valid and constitutional, and well

and thereby rendering the land and meadows suitable for tillage which could not otherwise be usefully improved at all, is for a purpose of such utility and advantage as

the industrial energies and promote the production
power of any considerable number of inhabitants

authorizes them to proceed in removing a portion of said dam in pursuance of its provisions; and they demur to the bill on the ground that the plaintiffs do not state a case which entitles them to relief in equity.

It is manifest from these averments and denials that the right of the plaintiffs to the relief which they seek depends chiefly on the allegation of the invalidity of the Act of the Legislature under which the defendants claim to derive their authority to reduce the height of the dam in the manner set out in the bill. This question has been very fully and elaborately discussed at the bar, and we have endeavored to bestow upon it very careful and deliberate consideration, not only on account of the important nature of the interests involved in our decision, but also because it requires us to determine whether the legislative department of the government has not exceeded the constitutional limits of its authority.

It is quite obvious that the first step in this inquiry is to ascertain, if we can, under what head or branch of legislative power or authority the Act in question falls. The intention of the legislature in this respect must be gathered mainly from the terms of the statute. There is no express declaration of the objects contemplated by it, but they are left to implication. Looking to the general structure of the act and the nature of its provisions, we cannot doubt that it was intended as an exercise of the right of eminent domain. It is similar to other legislative acts which authorize the taking of private property for a public use. It expressly authorizes the taking and removal of the dam by a board of public officers appointed for this specific purpose; it provides the same remedy in behalf of persons injured by such taking and removal as is given in case of damages occasioned by the laying out of highways; it affords to the party aggrieved by the award of the commissioners a trial by jury, and confers on this court the power to hear and determine all questions of law arising in the proceedings, and to set aside the verdict of the jury for sufficient cause. These provisions are inconsistent with the idea that the act was framed for the purpose of exercising the general police or superintending power over private property, which is vested in the legislature, or in order to prohibit a use of it which was deemed injurious to or inconsistent with the rights and interests of the public. If such were the object of the statute, there would be no necessity for the appointment of commissioners to take down and remove the dam, or for the provisions making compensation to those injured in their property thereby. Such enactments would be unusual in a statute intended only for a prohibition and restraint upon the appropriation or use of private property by its owners; but are the necessary and ordinary provisions when the legislature intend to exercise the right to take it for a 'supposed public use.' *Thacher v. Dartmouth Bridge*, 18 Pick. 501. *Commonwealth v. Tewksbury*, 11 Met. 55.

Such being the manifest design of the legislature in passing the Act

whether the legislature has transcended its power, is a question. There is a strong presumption in favor of the validity of such an exercise of power however.

in question, we are brought directly to a consideration of the objections urged by the plaintiffs against its validity. The first and principal one is that it violates the 10th article of the Declaration of Rights, because it authorizes the taking and appropriation of private property to a use which is not of a public nature.

In considering this objection, we are met in the outset with the suggestion, that it is the exclusive province of the legislature to determine whether the purpose or object for which property is taken is a public use, and that it is not within the province of the judicial department of the government to revise or control the will or judgment of the legislature upon the subject, when expressed in the form of a legal enactment. But this position seems to us to be obviously untenable. The provision in the Constitution, that no part of the property of an individual can be taken from him or applied to public uses without his consent or that of the legislature, and that when it is appropriated to public uses he shall receive a reasonable compensation therefor, necessarily implies that it can be taken only for such a use, and is equivalent to a declaration that it cannot be taken and appropriated to a purpose in its nature private, or for the benefit of a few individuals. In this view, it is a direct and positive limitation upon the exercise of legislative power, and any act which goes beyond this limitation must be unconstitutional and void. No one can doubt that if the legislature should by statute take the property of A and transfer it to B, it would transcend its constitutional power. In all cases, therefore, where this power is exercised, it necessarily involves an inquiry into the rightful authority of the legislature under the organic law. (But the legislature have no power to determine finally upon the extent of their authority over private rights.) That is a power in its nature essentially judicial, which they are by Article 30 of the Declaration of Rights expressly forbidden to exercise. The question whether a statute in a particular instance exceeds the just limits prescribed by the Constitution must be determined by the judiciary. In no other way can the rights of the citizen be protected, when they are invaded by legislative acts which go beyond the limitations imposed by the Constitution.

But it is to be borne in mind, that in determining the question whether a statute is within the legitimate sphere of legislative action, it is the duty of courts to make all reasonable presumptions in favor of its validity. It is not to be supposed that the lawmaking power has transcended its authority, or committed under the form of law a violation of individual rights. When an act has been passed with all the requisites necessary to give it the force of a binding statute, it must be regarded as valid, unless it can be clearly shown to be in conflict with the Constitution. It is therefore incumbent on those who deny the validity of a statute, to show that it is a plain and palpable violation of constitutional right. If they fail to do so, or leave room for a reasonable doubt upon the question whether it is an infringement of any of the guaranties secured by the Constitution, the presumption in favor of

the validity of the Act must stand. *Opinion of Justices*, 8 Gray, 21. Besides, it is a well settled rule of exposition that in considering whether a statute is within the limits of legislative authority, if it may or may not be valid according to circumstances, courts are bound to presume the existence of those circumstances which will support it and give it validity. *Wellington, Petitioner*, 16 Pick. 96.

The ultimate purpose which the legislature had in view in passing the Act under consideration does not distinctly appear by the terms of the Act itself. But it may be inferred from the title of the Act and the general scope of its provisions, that it was intended to relieve the meadows lying on the borders of Concord and Sudbury rivers, chiefly in the towns of Lincoln, Concord, Sudbury, and Wayland, from large quantities of water with which they are constantly overflowed, and which are supposed to be set back by the dam owned by the plaintiffs. This purpose is quite clearly indicated by the provisions in the fourth section of the Act, by which the removal of the dam under the Act is made to operate as a bar to any suits by the proprietors of lands flowed thereby for damages sustained in consequence of such flowage. And indeed it is conceded by the parties that such was the main purpose of the statute.

In many cases, there can be no difficulty in determining whether an appropriation of property is for a public or private use. If land is taken for a fort, a canal, or a highway, it would clearly fall within the first class; if it is transferred from one person to another or to several persons solely for their peculiar benefit and advantage, it would as clearly come within the second class. But there are intermediate cases where public and private interests are blended together, in which it becomes more difficult to decide within which of the two classes they may be properly said to fall. There is no fixed rule or standard by which such cases can be tried and determined. Each must necessarily depend upon its own peculiar circumstances. In the present case there can be no doubt that every owner of meadow land bordering on these rivers will be directly benefited to a greater or less extent by the reduction of the height of the plaintiffs' dam. The Act is therefore in a certain sense for a private use, and enures directly to the individual advantage of such owners. But this is by no means a decisive test of its validity. Many enterprises of the highest public utility are productive of great and immediate benefits to individuals. A railroad or canal may largely enhance the value of private property situated at or near its termini; but it is not for that reason any less a public work, for the construction of which private property may well be taken. We are therefore to look further into the probable operation and effect of the statute in question, in order to ascertain whether some public interest or benefit may not be likely to accrue from the execution of the power conferred by it upon the defendants. If any such can be found, then we are bound to suppose that the Act was passed in order to effect it. We are not to judge of the wisdom or expediency of exercising the

power to accomplish the object. The legislature are the sole and exclusive judges whether the exigency exists which calls on them to exercise their authority to take private property. If a use in its nature public can be subserved by the appropriation of a portion of the plaintiffs' dam in the manner provided by this Act, it was clearly within the constitutional authority of the legislature to take it, and in the absence of any declared purpose, we must assume that it was taken for such legitimate and authorized use.

The geographical features of the Concord and Sudbury rivers are properly within the judicial cognizance of the court. They are stated in detail in the opinion of the court in *Sudbury Meadows v. Middlesex Canal*, 23 Pick. 45. From that case and an inspection of the map, it appears that these two rivers, forming parts of the same stream, pass for a distance exceeding twenty miles through a tract of country, forming their banks or borders, consisting chiefly of meadows comprising many hundreds of acres; that throughout this extent the waters are very sluggish, having only a slight fall, until they reach the plaintiffs' dam. It might well be supposed that the necessary effect of an obstruction in a stream of this nature would be to cause the waters to flow back in the bed of the rivers, to fill up their courses or channels, to overflow their sides, and to inundate to a great extent the adjacent land, which is naturally low and level, and thus to render it unfit for agricultural purposes and deprive it of its capacity to produce any profitable or useful vegetation. The improvement of so large a territory, situated in several different towns and owned by a great number of persons, by draining off the water and thereby rendering the land suitable for tillage, which could not otherwise be usefully improved at all, would seem to come fairly within the scope of legislative action, and not to be so devoid of all public utility and advantage as to make it the duty of this court to pronounce a statute, which might well be designed to effect such a purpose, invalid and unconstitutional. The Act would stand on a different ground, if it appeared that only a very few individuals or a small adjacent territory were to be benefited by the taking of private property. But such is not the case here. The advantages which may result from the removal of the obstruction caused by the plaintiffs' dam are not local in their nature, nor intended to be confined to a single neighborhood. They are designed to embrace a large section of land lying in one of the most populous and highly cultivated counties in the State, and by increasing the productive capacity of the soil to confer a benefit, not only on the owners of the meadows, but on all those who will receive the incidental advantage arising from the development of the agricultural resources of so extensive a territory.

It has never been deemed essential that the entire community or any considerable portion of it should directly enjoy or participate in an improvement or enterprise, in order to constitute a public use, within the true meaning of these words as used in the Constitution. Such an

interpretation would greatly narrow and cripple the authority of the legislature, so as to deprive it of the power of exerting a material and beneficial influence on the welfare and prosperity of the State. In a broad and comprehensive view, such as has been heretofore taken of the construction of this clause of the Declaration of Rights, everything which tends to enlarge the resources, increase the industrial energies, and promote the productive power of any considerable number of the inhabitants of a section of the State, or which leads to the growth of towns and the creation of new sources for the employment of private capital and labor, indirectly contributes to the general welfare and to the prosperity of the whole community.

It is on this principle, that many of the statutes of this Commonwealth by which private property has been heretofore taken and appropriated to a supposed public use are founded. Such legislation has the sanction of precedents, coeval with the origin and adoption of the Constitution, and the principle has been so often recognized and approved as legitimate and constitutional that it has become incorporated into our jurisprudence. One of the earliest and most familiar instances of the exercise of such power under the Constitution is to be found in St. 1795, c. 74, for the support and regulation of mills. By this statute the owner of a mill had power, for the purpose of raising a head of water to operate his mill, to overflow the land of proprietors above and thereby to take a permanent easement in the soil of another, to the entire destruction of its beneficial use by him, on paying a suitable compensation therefor. Under the right thus conferred, the more direct benefit was to the owner of the mill only; private property was in effect taken and transferred from one individual for the benefit of another; and the only public use, which was thereby subserved, was the indirect benefit received by the community by the erection of mills for the convenience of the neighborhood, and the general advantage which accrued to trade and agriculture by increasing the facilities for traffic and the consumption of the products of the soil. Such was the purpose of this statute, as appears from the preambles to the provincial Acts of 8 and 13 Anne, from which the statute of 1795 was substantially copied. It is thereby declared that the building of mills has been "serviceable for the public good and benefit of the town or considerable neighborhood." Anc. Chart. 388, 404.

In like manner, and for similar purposes, acts of incorporation have been granted to individuals with authority to create large mill powers for manufacturing establishments, by taking private property, even to the extent of destroying other mills and water privileges on the same stream. *Boston & Roxbury Mill Dam v. Newman*, 12 Pick. 467. *Hazen v. Essex Co.*, 12 Cush. 478. *Commonwealth v. Essex Co.*, 13 Gray, 249. The main and direct object of these Acts is to confer a benefit on private stockholders who are willing to embark their skill and capital in the outlay necessary to carry forward enterprises which indirectly tend to the prosperity and welfare of the community. And

it is because they thus lead incidentally to the promotion of "one of the great public industrial pursuits of the Commonwealth," that they have been heretofore sanctioned by this court, as well as by the legislature, as being a legitimate exercise of the right of eminent domain justifying the taking and appropriation of private property. *Hazen v. Essex Co.*, 12 Cush. 475.

It is certainly difficult to see any good reason for making a discrimination in this respect between different branches of industry. If it is lawful and constitutional to advance the manufacturing or mechanical interests of a section of the State by allowing individuals acting primarily for their own profit to take private property, there would seem to be little, if any, room for doubt as to the authority of the legislature, acting as the representatives of the whole people, to make a similar appropriation by their own immediate agents in order to promote the agricultural interests of a large territory. Indeed it would seem to be most reasonable, and consistent with the principle upon which legislation of this character has been exercised and judicially sanctioned in this commonwealth, to hold that the legislature might provide that land which has been taken for a public use and subjected to a servitude or easement by which its value has been impaired and it has been rendered less productive, should be relieved from the burden, if the purpose for which it was so appropriated has ceased to be of public utility, and its restoration to its original condition, discharged of the incumbrance, will tend to promote the interest of the community by contributing to the means of increasing the general wealth and prosperity. If the right of a mill owner to raise a dam and flow the land of adjacent proprietors has ceased to be of any public advantage, and tends to retard prosperity and to impoverish the neighborhood, and the withdrawal of the water from the land by taking down the dam and rendering the land available for agricultural purposes would be so conducive to the interests of the community as to render it a work of public utility, there is no good reason why the legislature may not constitutionally exercise the power to take down the dam on making suitable compensation to the owner. > It would only be to apply to the mill-owner for the benefit of agriculture the same rule which had been previously applied to the land-owner for the promotion of manufacturing and mechanical pursuits.

Nor are we without precedent for acts of legislation by which private property has been taken for the purpose of improving land and rendering it fertile and productive. The St. of 1795, c. 62, for the improvement of meadows, swamps, and low lands, recognizes the right of taking private property for the purpose of redeeming lands from the effects of stagnant water and of being overflowed by obstructions in brooks and rivers. This statute, re-enacted by the Rev. Sts. c. 115, has been long in use, and many proceedings under it have taken place, some of which have passed under the judicial cognizance of this court. But in none of these has the validity of the statute been doubted or

denied. *Coomes v. Burt*, 22 Pick. 422. *Day v. Hullburt*, 11 Met. 321. Under the provisions of this Act, not only is it competent to drain or overflow the land of a proprietor without his assent, and to compel him to pay a portion of the expense attendant on the proposed improvement, but also to open the flood-gates of any mill or make needful passages through or round the dam thereof and erect temporary dams on the land of any person who is not a proprietor or a party to the proceedings. For the injury thus occasioned to private property, a remedy is provided by the statute. But it is clearly an appropriation of private property primarily for the benefit of the owners of the meadows or low lands which are intended to be improved, and where the public use or benefit which justifies such appropriation consists in the indirect advantage to the community, derived from the increase of the productive capacity of the soil and the promotion of the agricultural interests of the owners of the land.

It was suggested at the argument, that there was an essential difference between the provisions of statute for the improvement of meadows and low lands and that under consideration, because by the former it was provided that the damages should be paid by the parties benefited, whereas by the latter they are to be paid out of the public treasury. But we cannot see the force or bearing of this suggestion. The mode of compensating the party whose property is taken cannot affect the validity of the appropriation, so far as it depends on the question, whether it was taken for a public use. If the use is not in its nature public, the appropriation is invalid and unconstitutional, and the mode by which compensation to the owners of land taken is to be made is wholly immaterial. { It is only when property is taken for a purpose for which it may be constitutionally appropriated, that it becomes necessary to determine whether provision is made for compensation, suitable and adequate to furnish a remedy to the party injured. }

But if there were no precedent for such legislation, and if we were unable to see that any use in its nature public could be effected by the exercise of the power conferred on the commissioners by the terms of the Act under consideration, we should be slow to decide, on the case as stated in the bill, that the statute was invalid, and that the legislature in passing it transcended their constitutional authority. The burden of establishing this proposition is on the plaintiffs. They are bound to make such averments in their bill, either by way of allegations of fact or conclusions of law, as *prima facie* to make it appear that the Act has no force or validity. . . . The bill contains no such allegation. Certainly in a hearing on bill and answer, the court cannot assume the Act to be unconstitutional, in the absence of any statement of facts or other averments to sustain the allegation that it takes property "for uses and purposes which are in violation of the tenth article of the Bill of Rights of the Constitution of the Commonwealth of Massachusetts." Nor is it to be overlooked in this connection, that the ordinary presumption in favor of the validity of an Act of the Legislature is greatly

strengthened in the present case by the consideration that the power to take the property of the defendants is not delegated to any persons or corporation for their private advantage and emolument, who are to make compensation for the property taken out of their private capital or stock. But it is an exercise of the power of eminent domain directly by the State itself through agents specially appointed for the purpose, and the compensation provided for those whose property may be taken or injured by the reduction of the dam is to be paid from the public treasury. An Act thus framed clearly indicates that in the judgment of the legislature it was designed to subserve some important public use, so necessary that it ought not to be left to private enterprise, and so universal that the burden of accomplishing the object should be borne, not by individuals, or corporations, or towns, but by all the people of the Commonwealth. (We know of no instance in the jurisprudence of this country, where an Act, so clearly intended to effect a purpose which was deemed by the legislature to be of public utility, has been adjudged unconstitutional and void.) Every reasonable presumption is against such a conclusion, and it would require very strong circumstances to lead the court to overrule the judgment of a co-ordinate branch of the government, so unequivocally expressed in a matter primarily within their province to determine.

The validity of the statute is called in question by the plaintiffs on the further and distinct ground that it contains no reasonable, certain, and adequate provision for compensation to those whose property may be taken and appropriated in carrying out the purposes of the Act. But it seems to us that there is an obvious and decisive answer to this objection. By the third section of the Act, it is provided that the damages which may be recovered on due proceedings had by the parties injured shall be paid out of the treasury of the Commonwealth, and the governor is authorized to draw his warrant therefor. This is clearly an appropriation of so much money as may be necessary to pay the damages which may be assessed under the Act. The provision could not be more explicit or definite as to the amount appropriated. Until the damages are ascertained and adjudicated, the sum which will be required to pay them is necessarily uncertain. There is no provision of law, which makes it requisite to the validity of an appropriation from the treasury of the Commonwealth that a specific sum should be named and set apart as a fund to meet a particular exigency. It is sufficient if by an Act or resolve passed during the same or the preceding political year the payment is authorized. St. 1858, c. 1, §§ 1, 2. Gen. Sts. c. 15, §§ 30, 31. That such an appropriation affords a remedy sufficiently adequate and certain is too clear to admit of doubt. It is a pledge of the faith and credit of the Commonwealth, made in the most solemn and authentic manner, for the payment of the damages as soon as they are ascertained and liquidated by due process of law. Unless we can say that such a provision affords no reasonable guaranty that the persons injured will receive compensation, we cannot adjudge the

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statute to be unconstitutional. We certainly cannot assume that the Commonwealth will not fulfil its obligations. The presumption is directly the other way. Indeed the plaintiffs do not aver in their bill that the damages which may be awarded to them under the Act will not be duly paid. How then can it be said that no suitable and adequate provision is made in the Act, by which the plaintiffs can receive the compensation to which they may be entitled? The answer to the argument that no process is provided by which the payment can be secured and enforced is, that no such provision is necessary in cases where the power of eminent domain is exercised immediately by the State itself, in pursuance of a statute which enacts that compensation is to be made by a warrant drawn by the governor of the Commonwealth upon the public treasury. We are bound to presume that the chief magistrate of the State will perform his duty by drawing his warrant in conformity with the requirements of law, and that payment of a public debt thus created will be duly made in like manner as all public dues and liabilities are paid out of the treasury of the State. The elementary principle that the sovereign can do no wrong is the foundation on which rests the rule, recognized in our jurisprudence, by which the State is exempted from being subject to process at the suit of a creditor. The presumption of law is, that the State will keep its faith inviolate, and honestly fulfil all its obligations. 3 Bl. Com. 255. 4 Bl. Com. 33. Broom's Max. (3d ed.) 51. *Hill v. United States*, 9 How. 386.

*Injunction dissolved.*¹

¹ That the improvement of Boston Harbor is an object of a public nature, and thus that lands taken for this purpose are taken for a public use, can hardly be controverted. It is not necessary that the entire community should directly enjoy or participate in an improvement or enterprise, in order to constitute a public use; and a benefit to the principal harbor of the Commonwealth is much more than a local advantage. Nor when we consider that Acts of Incorporation have been granted, and fully recognized as constitutional, which authorized the taking of private property for the purpose of carrying forward enterprises such as the construction of railroads, or others which tend to the prosperity and welfare of large portions of the community, should we be willing to say, even if no improvement of Boston Harbor formed a part of the purpose, that the legislature might not properly provide for the reclamation of a large body of lands, such as flats, substantially useless in their original condition, for railroad and commercial purposes, by taking, subject to proper compensation, such of them as were necessary for the accomplishment of the object. *Boston & Roxbury Mill Co. v. Newman*, 12 Pick. 467. *Talbot v. Hudson*, 16 Gray, 417. *Bancroft v. Cambridge*, 126 Mass. 438. — DEVENS, J., for the court, in *Moore v. Sanford*, 151 Mass. 285, 290. (1890.) Compare ante, pp. 893-916; *Kingman et al. Pet'rs*, 153 Mass. 566, 571, s. c. infra, p. 1234 n. and *Waterloo Co. v. Shanahan*, 128 N. Y. 345 (1891).

In *Com'rs v. Moesta*, 91 Mich. 149, 153 (1892), the court (MONTGOMERY, J.) in sustaining proceedings under a statute for taking land for the widening of a "boulevard" in Detroit, said: "Complaint is also made of the definition of 'public necessity' employed. The judge charged as follows: 'The term "necessary" does not mean that it is indispensable or imperative, but only that it is convenient and useful, and therefore, if you find that the improvement is useful, and a convenience and a benefit to the public sufficient to warrant the expense of making it, then you may find it necessary.' The jury must have understood this charge to mean that in order to justify a finding of necessity, it must appear that the improvement was a convenience,

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GEORGE HIGGINSON ET AL. v. INHABITANTS OF NAHANT
ET AL.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1866.

[11 Allen, 530.]

BILL in equity against the inhabitants of Nahant and the selectmen thereof, to restrain them from constructing a way which had been laid out by the selectmen. . . .

The case was reserved for the determination of the whole court.

S. Bartlett and *H. W. Paine* (*F. O. Prince* with them), for the plaintiffs.

W. C. Endicott, for the defendants.

HOAR, J. There are three principal questions presented for adjudication upon this report; the first two requiring a decision of the rights of the plaintiffs, and the third concerning only the remedy.

The first and most important of these is whether, when a town way has been laid out by the selectmen of a town with all the forms pre-

— a benefit to the public of sufficient importance to warrant the public in incurring the expense in making it. This would, under our decisions, constitute a public necessity. *Paul v. Detroit*, 32 Mich. 119."

In *Paul v. Detroit*, 32 Mich. 108, 113 (1875), the court (CAMPBELL, J.) said: "The Constitution [of Michigan] provides (Art. 18, Sec. 2) that 'when private property is taken for the use and benefit of the public, the necessity for using such property, and the just compensation to be made therefor (except when to be made by the State), shall be ascertained by a jury of twelve freeholders, residing in the vicinity of such property,' or by commissioners appointed by a court of record. An exception was afterwards made of highway commissioners. . . . This provision is not found in constitutions generally, and was never known in Michigan until the adoption of the Constitution of 1851. Before that neither jury nor commissioners had any duty to perform except assessing damages, and the prerogative of taking property on their own estimate of its necessity was exercised by legislatures or those persons or corporations whom they allowed to act in the matter.

"The change was made from a well-founded belief, founded on experience, that private property was often taken improperly and without any necessity, and that the pretence of public utility was often a cloak for private aggrandizement. Ways were forced through private property to enrich the owners of other property, who were enabled by intrigues and sinister influences to induce municipal bodies to use the public authority to subserve their private schemes. The system was abused to the oppression of individuals by corruption and bargaining, and the sacredness of private property, and its immunity from any interference not required by actual public exigencies, ceased to be respected.

"The Constitution has changed this by requiring the whole subject to be determined by a jury of freeholders; so that each case shall be determined by a separate tribunal summoned expressly for the purpose, who must be unanimous in their views before any land can be taken; who must act openly and before all concerned, in hearing and receiving testimony; who cannot listen to private persuasion, and where any attempt to influence them will subject the offender to severe and disgraceful punishment. All these safeguards are implied in the use of the term 'jury;' and no action, by laws, or by proceedings under them, can be maintained, if any of these securities are impaired or disregarded." — Ed.

The plain language to use of a

scribed by the statutes of the Commonwealth, and has been duly accepted by the town, it is competent, in order to impeach the validity of these proceedings, to show that the way is wholly on the land of the plaintiffs; that it enters their land from a highway and returns to it at about the same place where it enters; that it leads to no other way or landing-place, and can be used for no purposes of business or duty, or of access to the lands of any other person; but that it was laid out by the selectmen with the design to provide access, not for the town merely, but for the public, to points or places in the lands of the plaintiffs, esteemed by the selectmen, and those who applied to them to lay out the way, as pleasing natural scenery. It is certainly no objection to a town way that it will be serviceable not only to the inhabitants of the town, but also the public generally. Though it is laid out by the officers and constructed and paid for by the inhabitants of the town, all persons have an equal right to use it after it is completed. *Cragie v. Mellen*, 6 Mass. 7; *Monterey v. County Commissioners*, 7 Cush. 394.

But the position of the plaintiffs is, that in the case presented the way is not intended for the legitimate purposes of a way; that the pretence of laying it out as such is merely colorable; and that private property cannot be lawfully taken and appropriated to such a use.

It has been held that, in laying out a town way, a formal adjudication that the public convenience and necessity require it is not made essential to its legality. *Jones v. Andover*, 9 Pick. 154. The reason of this seems to be that the inhabitants of the town, who constitute the public for whose use and advantage the way is principally designed, and who are to bear the expense of constructing it, are to decide by their vote whether it shall be established. The particular community whose convenience is to be consulted determine the matter for themselves. That the town want the road is best settled by the town's voting to have it and pay for it.

But yet the statutes authorizing the laying out of town ways undoubtedly imply the exercise of an independent judgment by the selectmen that the way is needed. A way laid out by them in pursuance of instructions by the town is not warranted by law. *Kean v. Stetson*, 5 Pick. 492; *State v. Newmarket*, 20 N. H. 519. And the purpose for which the way is laid out may be inquired into, in order to show that it was illegal. Thus it has been decided in New Hampshire that where the object of a town way was merely to avoid a toll-gate upon a turnpike it could not lawfully be made, the reason being that it was an invasion of an existing franchise. *Turnpike Co. v. Champney*, 2 N. H. 199. And see *West Boston Bridge v. County Commissioners*, 10 Pick. 270. And in *Woodstock v. Gallup*, 28 Verm. 587, it was said by the court that, while ornament and the improvement of the grounds about a public building might well be taken into consideration and regarded in connection with the convenience and necessity of a proposed highway, they do not alone constitute a sufficient basis for establishing

Take a city like Paris where great attention is paid to fine vistas and streets are widened to accomplish that purpose. Is it possible?

it. The doctrine that public ways are for travel, and not for places of amusement, has also been recognized in this Commonwealth. *Blodgett v. Boston*, 8 Allen, 237.

But we are not aware of any case in which it has been ever held that, where there is an amount of travel sufficient to warrant the construction of a road which permanently seeks a particular avenue, the purpose for which the public want to travel is to be regarded, if the purpose is lawful. The plaintiffs have contended that the purpose for which a road is wanted must be a purpose of business or duty, in order to create a public exigency. But we think it impossible to go into such refinements. Nahant itself is a town which owes much of its population to its attractiveness for other purposes than business or profit. The passing from place to place is a rightful object of public provision in itself; and the occasions for it are as extensive as the pursuits of life. Pleasure travel may be accommodated as well as business travel. The security against an unreasonable invasion of private rights of property in establishing town ways unnecessarily is to be found, first, in the sense of justice and duty of the board of selectmen; secondly, in the improbability that the inhabitants of a town, with full opportunity for discussion and remonstrance, will vote to accept and construct a way which is not needed, and impose upon themselves the burden of constructing and maintaining it, as well as the damages to the landowners whose property is taken; and thirdly, in the power to apply to the county commissioners for the discontinuance of the way, if the town refuse to discontinue it. (But selectmen may lay out and towns may establish such ways as they think necessary for any of the lawful purposes of travel.) In *Blodgett v. Boston*, before cited, the chief justice uses this language in reference to the obligation of a town to keep a way in repair: "The word 'travellers' may well embrace within its meaning, as applied to the subject matter, every one, whatever may be his age or condition, who has occasion to pass over the highway for any purpose of business, convenience or pleasure. Nor is the motive or object with which a street or way is thus used, if it be not unlawful, at all material in determining whether a person is entitled to an indemnity from a city or town for an injury occasioned by a defect. The highway is to be kept safe and convenient for all persons having occasion to pass over it, while engaged in any of the pursuits or duties of life." And it would seem that roads may be established for the purposes for which they are afterward to be kept in repair. We think, therefore, that the only true test is whether a road is wanted for public travel; which, in the case of town ways, is to be decided by the inhabitants of the town; and that we cannot go into a consideration of the reasons which may induce people to wish to travel upon it, if the travel is for an innocent and lawful purpose.

If the doctrine for which the plaintiffs contend were supported, a road to the top of Mount Washington, to Niagara or Trenton Falls, to the Mammoth Cave of Kentucky, or the Natural Bridge in Virginia, or

even to a public park or common in the cities, would not come within the powers of the officers intrusted with the duty of laying out ways. It would also follow that the legislature would not have the constitutional right to take private property for a public park or pleasure ground, making full compensation to the owner — a conclusion which we should hesitate to arrive at without much farther consideration, in view of the important relations which air, exercise, and recreation bear to the general health and welfare of the community.

Nor is it to be forgotten that, while sufficient public ways are a protection against trespasses upon private property, there may be some reason to expect that a way furnishing access to "pleasing natural scenery" will lead to settlement and habitation, and that, in the plan of a town, it may be well to make some prospective provision for probable future wants of the inhabitants in this respect. . . .

*The bill must be dismissed with costs.*¹

¹ This may properly be deemed to be a public purpose, and a statute authorizing the raising of money by taxation for the erection of such a memorial hall may be vindicated on the same grounds as statutes authorizing the raising of money for monuments, statues, gates or archways, celebrations, the publication of town histories, parks, roads leading to points of fine natural scenery, decorations upon public buildings, or other public ornaments or embellishments, designed merely to promote the general welfare, either by providing for fresh air or recreation, or by educating the public taste or by inspiring sentiments of patriotism or of respect for the memory of worthy individuals. The reasonable use of public money for such purposes has been sanctioned by several different statutes, and the constitutional right of the legislature to pass such statutes rests on sound principles. Pub. Sts. c. 27, §§ 10, 11; Sts. 1882, cc. 154, 255, § 5; 1883, c. 119; 1884, c. 42; 1886, c. 76; 1889, c. 21; *Higginson v. Nahant*, 11 Allen, 530. — CHARLES ALLEN, J., for the court, in *Kingman v. Brockton*, 153 Mass. 255, 256 (1891).

In the case of *In the Matter of the Niagara Falls and Whirlpool Ry. Co.* 108 N. Y. 375 (1888), the court (ANDREWS, J.) in holding that the purpose in view was not one which would justify a resort to the right of eminent domain, said: "The Niagara River, from the foot of the American Falls, flows northerly for several miles with a very rapid current, and the river on either side is faced by precipitous cliffs, the cliff on the American side rising from near the edge of the river to a height of from one hundred and fifty to two hundred feet, to the table land above. The river from the falls to the point known as 'The Whirlpool,' a distance of about three miles, is interesting, and persons visiting the falls have been enabled by means of what is known as an inclined railway to descend from the top of the bank or table land, to the margin of the river. This railway was originally a private enterprise, but is now included in the land taken by the State for a State reservation. The 'Whirlpool' adjoins the lands of De Veaux College. The college has constructed a stairway leading down to the margin of the river at this point for the convenience of visitors, and derives a revenue from its use. The petitioner has located its road along the margin of the river, outside of the cliff, where the space is sufficient between the cliff and the river to permit the track to be laid and at other points where the cliff rises with more abruptness from the margin, the location contemplates cutting into the face of the cliff for the roadway. The proposed road does not connect at either end with a highway. It can be reached only by passing over the lands of the State or the lands of private owners. There can be no habitations along the line of the road, and no traffic, or commerce, or business, except in conveying passengers over the road to see the river and 'The Whirlpool,' and returning them again to the point from which they started. The season for visitors at the Falls is substantially confined to June, July, August, and

It connected with no highway, could be opened but a few months in the year, and to allow it to take land to continue river would not be for a public use.

IN *Shoemaker v. U. S.* 147 U. S. 282, 297 (1893), in considering certain questions relating to an Act of Congress of Sept. 27, 1890, purporting to authorize the establishing of a public park in the District of Columbia and the condemnation of certain land therefor, the court

September. The proposed road cannot be operated during the winter on account of the piling up of the ice, and if its operation was practicable in the winter season it would have nothing to do. It is apparent that the proposed enterprise has been undertaken and is to be carried on for the sole purpose of furnishing sight-seers during about four months of the year, greater facilities than they now enjoy for seeing the part of Niagara River along which the proposed road is to be constructed. . . .

"What is a public use is incapable of exact definition. The expressions public interest and public use are not synonymous. The establishment of furnaces, mills, and manufactures, the building of churches and hotels, and other similar enterprises, are more or less matters of public concern, and promote, in a general sense, the public welfare. But they lie without the domain of public uses for which private ownership may be displaced by compulsory proceedings. The ground upon which private property may be taken for railroad uses, without the consent of the owner, is primarily that railroads are highways furnishing means of communication between different points, promoting traffic and commerce, facilitating exchanges, in a word they are improved ways. In every form of government the duty of providing public ways is acknowledged to be a public duty. In this State the duty of laying out and maintaining highways has in the main been performed directly by the State or by local authorities, but from an early day the legislature has from time to time delegated to turnpike corporations the right and duty to maintain public roads in localities, and canal companies have been organized with powers of eminent domain. It would be impracticable and contrary to our usages for the State to enter upon the general business of constructing and operating railroads, and, in analogy to the delegation of the power of eminent domain to turnpike and canal companies, it wisely delegates to corporate bodies the right to construct and maintain railroads as public ways for the transportation of freight and passengers, and as incident thereto the right to take private property under the power of eminent domain on making compensation. In considering the question what is a public use for which private property may be taken *in invitum*, Judge Cooley (Const. Lim. 669) remarks 'that can only be considered such when the government is supplying its own needs, or is furnishing facilities for its citizens in regard to these matters of public necessity which on account of their peculiar character, and the difficulty, perhaps impossibility, of making provision for them otherwise, it is alike proper, useful, and needful for the public to provide.' Whatever rule, founded on the adjudged cases may be formulated on this subject, it cannot, we think, be framed so as to include the present case. The fact that the road of the petitioner may enable the portion of the public who visit Niagara Falls, more easily or more fully to gratify their curiosity, or that the road will be public in the sense that all who desire will be entitled to be carried upon it, is not sufficient, we think, in view of the other necessary limitations, to make the enterprise a public one so as to justify condemnation proceedings. The case does not, we think, differ in principle from an attempt on the part of a private corporation, under color of an Act of the Legislature, to condemn lands for an inclined railway, or for a circular railway, or for an observatory, to promote the enjoyment or convenience of those who may visit the Falls. The State has, under recent legislation, taken lands for a park or public place at Niagara Falls. The taking of lands by municipalities for public parks is recognized as a taking for public use. *Brooklyn Park Commissioners v. Armstrong*, 45 N. Y. 234; *In re Mayor*, etc., 99 Id. 569. They contribute to the health and enjoyment of the people and are laid out with drives and ways for public use. The proceedings in the case of *The Nahant Road* (11 Allen, 530) and *The Mount Washington Road* (35 N. H. 134), were justified on the ground that they were public highways in the ordinary sense, although primarily intended as pleasure drives. It is, as we have said, difficult to make an exact definition of a public use. It is easier to define it by

(SHIRAS, J.) said: "In the memory of men now living, a proposition to take private property, without the consent of its owner, for a public park, and to assess a proportionate part of the cost upon real estate benefited thereby, would have been regarded as a novel exercise of legislative power.

negation than by affirmation. We are conscious of the serious responsibility which the court assumes in undertaking to declare that not to be a public use, which the legislature has declared to be such. The validity of an Act of the Legislature is not to be assailed for light reasons. It is especially necessary that the question of what constitutes a public use, should not be dealt with in a critical or illiberal spirit, or made to depend upon a too close construction adverse to the public. But having these considerations in mind, we are nevertheless constrained to conclude that the enterprise in question is essentially private and not public, and that private property cannot be taken against the will of the owners for the construction of the road of the petitioner. The order appealed from should, therefore, be affirmed. All concur. Order affirmed."

Compare *Oury v. Goodwin*, 26 Pac. Rep. 376 (Ariz. 1891), *In re Rock R. R. Co.* 12 N. Y. Sup. 566 (1890), *In re Buffalo*, 15 N. Y. Sup. 123 (1891).

In *Farist Steel Co. v. Bridgeport*, 60 Conn. 278, 291 (1891), the court (SEYMOUR, J.) said: "One other point demands consideration. It is claimed that, even if all the proceedings were legal in form, yet there is a fatal objection to the validity of the assessment, in that the case itself discloses the fact that the harbor lines were established and the appellant's land condemned in order that the new bridge, 'that expensive and slightly structure should not be marred by placing buildings on either side thereof,' and not for any legitimate public use whatever. The appellant says that, except for public uses, private property cannot be taken even upon the payment of just compensation. We presume that no one will question the correctness of that proposition. The taking of private property in the legal establishment of harbor lines is *prima facie* a taking for public use. The legislature so considered it in granting the charter to the city of Bridgeport, and, though that fact is not conclusive, inasmuch as it is held almost universally that whether a particular use is public or not within the meaning of the Constitution is a question for the judiciary, still there can be no question but that property taken in the legal establishment of harbor lines is taken for public use. But the right to establish harbor lines, and to take private property for that purpose, must be exercised in good faith and for a public use naturally connected with their establishment. Private property cannot be taken for other than public uses under the guise of taking it for public use. There may be difficulty in many cases in applying this rule, as where nothing appears in the proceedings of the purpose for which the lines were established, and the presumption would be that they were established in the interest of navigation. But where, as in the present case, all the proceedings declare the purpose to be an ulterior one, which no one would claim to be a public one within the meaning of the Constitution, when this purpose is spread upon the very records which are laid before us as containing the authority on which the assessment committee acted, we should be shutting our eyes to the real state of affairs, and permitting property to be taken under the excuse of the right of eminent domain in a case where no public use was contemplated, if we should decide in accordance with the appellee's claim. That would commit us to the doctrine that we are bound by the fact that it was a harbor line that was established, no matter for what purpose it appears to have been established nor how far it is removed from the harbor. We cannot accept that conclusion, but must hold that, whereas it appears from the records themselves, which are introduced to show the facts upon which the legality of the assessment depends, that the harbor lines were laid for the purpose of preventing a new bridge from being marred by the building of structures connected with it which would obscure it, and not in the interests of navigation or any other public use, private property cannot be taken without violating constitutional rights. It is unnecessary to consider the other questions which were discussed. Upon those already considered we advise the Superior Court to render judgment for the appellant, annulling the assessment appealed from."—ED.

"It is true that, in the case of many of the older cities and towns, there were commons or public grounds, but the purpose of these was not to provide places for exercise and recreation, but places on which the owners of domestic animals might pasture them in common, and they were generally laid out as part of the original plan of the town or city.

"It is said, in Johnson's Cyclopædia, that the Central Park of New York was the first place deliberately provided for the inhabitants of any city or town in the United States for exclusive use as a pleasure-ground, for rest and exercise in the open air. However that may be, there is now scarcely a city of any considerable size in the entire country that does not have, or has not projected, such parks.

"The validity of the legislative Acts erecting such parks, and providing for their cost, has been uniformly upheld. It will be sufficient to cite a few of the cases. *Brooklyn Park Commissioners v. Armstrong*, 45 N. Y. 234; *In re Commissioners of the Central Park*, 63 Barb. 282; *Owners of Ground v. Mayor of Albany*, 15 Wend. 374; *Holt v. Somerville*, 127 Mass. 408; *Foster v. Boston Park Commissioners*, 131 Mass. 225; also 133 Mass. 321; *St. Louis County Court v. Griswold*, 58 Missouri, 175; *Cook v. South Park Commissioners*, 61 Illinois, 115; *Kerr v. South Park Commissioners*, 117 U. S. 379. In these and many other cases it was, either directly or in effect, held that land taken in a city for public parks and squares, by authority of law, whether advantageous to the public for recreation, health or business, is taken for a public use.

"In the case cited from the Missouri Reports, where the legislature had authorized the appropriation of land for a public park for the benefit of the inhabitants of St. Louis County, situated in the eastern portion of the county, near to and outside of the corporate limits of the city of St. Louis, it was held that this was a public use, notwithstanding the fact that it would be chiefly beneficial to the inhabitants of the city, and that the Act was not unconstitutional.

"The adjudicated cases likewise establish the proposition that while the courts have power to determine whether the use for which private property is authorized by the legislature to be taken, is in fact a public use, yet, if this question is decided in the affirmative, the judicial function is exhausted; that the extent to which such property shall be taken for such use rests wholly in the legislative discretion, subject only to the restraint that just compensation must be made.

"A distinction, however, is attempted in behalf of the plaintiffs in error between the constitutional powers of a State and those of the United States, in respect to the exercise of the power of eminent domain, and this distinction is supposed to be found in a restriction of such power in the United States to purposes of political administration; that it must be limited in its exercise to such objects as fall within the delegated and expressed enumerated powers conferred by the Constitution upon the United States, such as are exemplified by the case of post-offices, custom-houses, court-houses, forts, dockyards, etc.

“We are not called upon, by the duties of this investigation, to consider whether the alleged restriction on the power of eminent domain in the general government, when exercised within the territory of a State, does really exist, or the extent of such restriction, for we are here dealing with an exercise of the power within the District of Columbia, over whose territory the United States possess, not merely the political authority that belongs to them as respects the States of the Union, but likewise the power ‘to exercise exclusive legislation in all cases whatsoever over such District.’ Constitution, Art. I., Sec. 8, par. 17. It is contended that, notwithstanding this apparently unlimited grant of power over the District, conferred in the Constitution itself, there was a limitation on the legislative power of the general government contained in the so-called Act of Cession by the State of Maryland (Act of 1791, c. 45, § 2), a proviso to which is in the words following: ‘Provided, that nothing herein contained shall be so construed to vest in the United States any right of property in the soil, as to affect the right of individuals therein, otherwise than the same shall or may be transferred by such individuals to the United States.’ It is said that the acceptance by the United States of the grant constituted a contract between Maryland and the United States, whereby, in view of the foregoing language, the land owner was to be protected against any exercise by the general government of the sovereign power of eminent domain. It is sufficient to say that the history of the transaction clearly shows that the language used in the Maryland Act referred to such persons as had not joined in the execution of a certain agreement by which the principal proprietors of the Maryland portion of the territory undertook to convey lands for the use of the new city, and their individual rights were thus thought to be secured. The provision had no reference to the power of eminent domain, which belonged to the United States as the grantee in the act of cession.

“This position, contended for by the plaintiffs in error, was raised in the case of *Chesapeake & Ohio Canal v. Union Bank*, in the Circuit Court of the United States for the District of Columbia, and Cranch, C. J., said: ‘The eighth objection is that by the Maryland Act of Cession to the United States, of this part of the District of Columbia (1791, c. 45, sec. 2), Congress are restrained from affecting the rights of individuals to the soil, otherwise than as the same should be transferred to the United States by such individuals; and it is contended that this prohibits the United States from taking private property in this District for public use, and that the right of sovereignty, which Maryland exercised, was not transferred. We think it is a sufficient answer to this objection to say that the United States do not, by this inquisition or by the charter to the Chesapeake & Ohio Canal Company, claim any right of property in the soil. They only claim to exercise the power which belongs to every sovereign, to appropriate, upon just compensation, private property to the making of a highway, whenever the public good requires it.’ 4 Cranch, C. C. 75, 80.

"But this contention can scarcely have been seriously made in view of the explicit language of the Maryland Act in its second section: 'That all that part of said territory called Columbia, which lies within the limits of this State, shall be, and the same is hereby, acknowledged to be forever ceded and relinquished to the Congress and government of the United States, in full and absolute right and exclusive jurisdiction, as well of soil as of persons residing or to reside thereon, pursuant to the tenor and effect of the eighth section of the first article of the Constitution of government of the United States.' *Mattingly v. District of Columbia*, 97 U. S. 687, 690; *Gibbons v. District of Columbia*, 116 U. S. 404."¹

PALAIRET'S APPEAL.

SUPREME COURT OF PENNSYLVANIA. 1871.

[67 Pa. St. 479.]

February 14, 1871. Before THOMPSON, C. J., AGNEW, SHARSWOOD, and WILLIAMS, JJ. READ, J., at *Nisi Prius*.

Appeal from the decree of the Court of Common Pleas of Philadelphia: No. 221, to January Term, 1871.

The proceeding was commenced February 24, 1871, by a petition in the name of the Commonwealth, at the relation of John Ganser against John G. Palairret and others, trustees, &c., of Mary Ann Palairret, under the Act of April 15, 1869, Pamph. L., 1869, p. 47, *Purd.* 1570, which is as follows: [The Act is given in a note.²]

¹ See *ante*, pp. 348-364 — Ed.

² "An Act to provide for the extinction of irredeemable rents.

"Whereas, there were formerly reserved or created in Philadelphia and other parts of this Commonwealth, yearly rents, which in their nature or by lapse of time are or have been irredeemable by the owners of the land whereout they issue; in consequence whereof the power of such landowners to sell or mortgage their land is greatly limited.

"And whereas, the policy of this Commonwealth has always been to encourage the free transmission of real estate, and to remove restrictions on alienation, so that it is and is hereby declared to be necessary for the public use to provide a method of extinguishing such irredeemable rents, having a due regard for private rights: therefore, —

"Section 1. Be it enacted, &c., That it shall be lawful for any owner of land, on or out of which any irredeemable rent has been charged or reserved, to apply by petition, in the name of this Commonwealth, at his own relation, to the Court of Common Pleas for the county in which such land shall be situated, for an order on the owner of such rent, to show cause why a decree for the extinguishment thereof should not be made on his being compensated therefor, in the manner hereinafter provided; whereupon the court shall cause a citation to issue to the owner of the rent, according to the practice of the said court; and if he shall be unknown, or not a resident of the said county, the court shall cause notice to be given to him by advertisement, as they shall deem advisable, and the notice so given shall be deemed and taken to be actual service for all purposes.

"Section 2. On the return of such citation, or after publication as aforesaid, if the

The petition set forth that the relator was seised of two lots of land in Philadelphia, subject to three irredeemable ground-rents, which are now owned by J. G. Palairer and others, trustees above named.

The petition prayed for —

An order and citation against the defendants to show cause why a decree for the extinguishment of the above-named ground-rents should not be made, upon their being compensated therefor, according to the terms and in the manner set forth in the above Act of Assembly.

The answer of the defendants admitted that they were seised of the three irredeemable ground-rents, as stated in the petition, and submitted to the court that their title to the said three yearly ground-rents, so held by them in trust, could not be divested or taken away from them, unless the same should be required by the Commonwealth for public use, in exercise of her right of eminent domain; and that where no public right is involved, and the question was merely between the said John Ganser, as owner of the property, and themselves, as the owners of an estate or encumbrance thereon, no act of the legislature could divest, or at all affect their right or title in and to the same.

After argument the Court of Common Pleas decreed the extinguishment of the ground-rents. . . .

The respondents appealed to the Supreme Court, and assigned the decree of the Court of Common Pleas for error.

owner of the land and the owner of the rent do not agree on the terms on which the former shall be allowed to purchase the rent, then the court shall cause a venire to issue, directed to the sheriff, requiring him to summon a jury of twelve disinterested freeholders of the county, who shall assess and determine the damages which the owner of the said rent will suffer by the compulsory extinction of the same, which shall not be estimated at less than twenty years' purchase thereof; and the damages being so assessed, and the inquest confirmed by the court, it shall be lawful for the owner of the land to pay or tender to or for the use of the owner of the rent, in such manner as the court shall direct, the sum so found, together with all the costs of the proceedings; and whereupon the court, upon due evidence of such payment or tender, shall enter a judgment that the said rent shall thenceforward be taken to be extinguished, and no action thereafter for the recovery thereof shall be brought in any court of this Commonwealth.

"Section 3. If such rent shall be held wholly or partly by any person under any disability, or absent from the country, or by persons for successive estates, or on trust, then the court shall have all such power to direct in what way the said damages, so assessed, shall be tendered, paid or secured, as a court of equity could have in the premises; and if the owner of the rent shall be unknown, then the money shall be paid into court, to be invested in the loan of this Commonwealth to the use of such owner; and if no claimant shall appear therefor within the space of ten years thereafter, such loan shall be transferred by the State treasurer to the sinking fund provided by law. . . .

"Section 5. That if the petitioner in any such case shall, after the confirmation of the return of the inquest, fail for the space of three months to pay or tender the damages and costs aforesaid, according to the directions of the court, it shall be lawful for the court thereupon, at the option of the respondent, to enter a judgment for the payment of such damages and costs by the petitioner, to be enforced by execution, as other judgments in the said court, or else to dismiss the petition, and vacate the proceedings thereon at the petitioner's costs."

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G. W. Biddle and *W. H. Rawle*, for appellants. *H. Wharton*, for appellee.

The opinion of the court was delivered May 8, 1871, by SHARSWOOD, J. . . .

It is contended that the property of the appellants has been taken in the exercise by the Commonwealth of her right of eminent domain, which she may exercise herself or confer upon corporations or individuals. If so, as it is conceded that full provision for compensation is made, it is within the saving of that other section of the Declaration of Rights — “nor shall any man’s property be taken or applied to public use, without the consent of his representatives and without just compensation being made;” Const. Penna., Art. IX., § 10. No doubt the right of eminent domain, being for the safety and advantage of the public, overrides all rights of private property. But for what public use has this estate of the appellants been taken and applied? It has been contended, as the preamble of the Act declares, that “the policy of this Commonwealth has always been to encourage the free transmission of real estate, and to remove restrictions on alienation, so that it is, and is hereby declared to be, necessary for the public use to provide a method of extinguishing such irredeemable rents, having a due regard for private rights.” But if this is the kind of public use for which a man’s property can be taken, there is practically no limit whatever to the legislative power. It would result that whenever the legislature deem it expedient to transfer one man’s property to another upon a valuation, they can effect their object. What that department of the government considers and pronounces to be the policy of the Commonwealth, the judicial department must accept as such. The members of the two houses with the executive, are, upon all questions of policy, the exclusive exponents of the will of the people. Let us test the principle now involved, by a case more extreme than that before us, but which will be *experimentum crucis*. If we can show that a principle logically carried out leads to an absurdity, it is conclusive against it. Suppose then the legislature should adopt what has been a favorite theory with many political economists, that small farms are injurious to the community, prevent the full development of the agricultural resources of a country, and ought therefore, as speedily as possible, to be united and formed into large ones. Then reciting this to be the true policy of the State, let them provide that every farm of less than one hundred acres shall be attached to and become the property of the adjoining owner of a larger farm at a valuation to be determined by a jury. When the King of Samaria coveted the little vineyard of Naboth hard by his palace, that he might have it for a garden of herbs, and offered to give him a better vineyard than it, or if it seemed good to him the worth of it in money, he was met by the sturdy answer, — “The Lord forbid it me that I should give the inheritance of my fathers unto thee.” Would any one be hardy enough to stand up in a republican country and claim for its government a power which an Eastern monarch dared not to assume? It

was well remarked by Mr. Justice Gilchrist in the *Concord Railroad Co. v. Greeley*, 17 N. H. 57, that "even if the legislature should declare that an Act taking the property of A. and giving it to B. as his private property, was an application of it to public uses, no one would contend that such a declaration made that public which in its nature and object was private." It is not necessary to define what is a public use, — it is quite sufficient to say that the object as set forth in the preamble of this Act is not a public use within the right of eminent domain of the State. Other instances may be mentioned of the dangerous extent of this principle, should it be judicially approved, that the declaration of a general policy will constitute a valid public use. In the course of the development of the immense mineral resources of this State, it has become very common to separate the estate in the mines from the estate in the surface. This has been held to be lawful — as in entire conformity with the established principles of the common law of England, which is the substratum of our system of jurisprudence. It may be found, however, in course of time to be a very inconvenient and even perilous state of things — more so than an intangible, incorporeal hereditament, such as a ground-rent. The legislature may adopt the policy of preventing it, and may well, by laws acting prospectively, prohibit the creation of such separate estates in the same land. But how as to existing estates which have been lawfully created under the sanction of the law and the decisions of this court, are they to be subject to the legislative fiat? Can an Act of Assembly compel the owner of the minerals to surrender his property to the owner of the soil at the valuation of a jury? Can a law say that twelve men shall determine at what price I shall sell my property to another? In the consideration of the practical bearings of this question, we must strike out of the Act of 1869 the provision that the compensation to be awarded shall not be less than twenty years' purchase of the rent. If this is a legitimate taking for public use, that clause might well have been omitted. Whenever property is so taken, all that is necessary is, that some impartial tribunal shall estimate the damages sustained by the owner, and in the case of any corporate body or individual invested with such privilege, that such corporation or individual shall make compensation or give adequate security therefor before such property shall be taken: Const. Art. VII. § 4. What would be the value of coal-mines and mineral estates if the owners could be deprived of them at any time to be selected by the surface proprietor, by the valuation of a jury, upon the principle that private property may be taken from one man and transferred to another, on the ground that it is the policy of the Commonwealth to put an end to such estates separate from the surface of the soil? There are many rights of way resting on express grant — bought and paid for — but now very burdensome and annoying to the owners of the land over which they pass; can they be blown away by the legislature upon this same plea? I say nothing of private roads laid out by authority of law and paid for, nor of ways resting upon prescription

and lapse of time, on account of the first section of the Act of April 21, 1846, Pamph. L. 416, which gives the Courts of Quarter Sessions power to vacate such roads and ways without compensation, and the decision in *Stuber's Road*, 4 Casey, 199, which affirmed the constitutionality of that Act, except individually to express my surprise that the same learned judge who wrote the opinion in that case, when he came to decide *Baggs's Appeal*, 7 Wright, 512, did not advert to his first opinion. It is enough for the present purpose to say that the decision in *Stuber's Road* is not put on the ground of the exercise of the right of eminent domain. That Act excepts private roads resting upon express grant, the evidence of which is still in existence; and apart from the fact that no compensation is provided, it is evident that private property, though derived from express grant or contract, is not therefore exempt from the right of eminent domain. I put aside the decision in *Stuber's Road*, as resting upon grounds peculiar to itself, not affecting this argument. One more illustration of the extent to which the principle may be carried will be sufficient. A man provides by his will an annuity for his widow for her life, and charges it on his lands, or if he dies intestate, the law does the same thing on partition among his heirs. Here is an encumbrance of the same character as a ground-rent, which though not perpetual, may still continue for an indefinite period, — the life of the widow. It is within the policy recited in this preamble — it is an impediment to the free transmission of real estate, and a restriction on alienation which ought to be removed out of the way. If an act should be passed extinguishing this annuity of the widow on a valuation of her life interest — even though it were provided that it should not be less than the value fixed for such an annual sum by the annuity tables — would it not shock the moral sense and feeling of the entire community? Yet wherein does that case differ from the one before us except in immaterial circumstances?

It is said that the Act of November 27, 1779, 1 Sm. L. 479, commonly called the *Divesting Act*, by which the estates of the proprietaries were vested in the Commonwealth, is an instance in which private property was taken on reasons of policy. That Act, like the Revolution from which its necessity arose, can be a precedent for nothing in the ordinary course of legislation. It is well vindicated by its preamble, which claims that the rights of property and powers of government in William Penn and his heirs were stipulated to be used and enjoyed as well for the benefit of the settlers as for his own particular emolument, and that these rights and powers could no longer consist with the safety, liberty and happiness of the people. It is by no means clear that the Commonwealth, on the principles of public law, had not a strict legal right to all that was resumed, and that the compensation she made was not an act of liberality, as indeed it is declared in the Act, to be in "remembrance of the enterprising spirit which distinguished the founder of Pennsylvania," as well as in consideration "of the expectations and dependence of his descendants." . . .

It has also been pressed upon us that private roads as well as lateral railroads are cases parallel with the Act now before us, as in them, on mere grounds of policy, private property is taken for a private use on compensation made. As to private roads, they originated at a very early period by an Act of Assembly of February 20, 1735-1736, Hall and Sellers 188, re-enacted in the 17th section of the Act of April 4, 1802, 3 Sm. L. 512, and incorporated by the revisers in the General Road Law of June 13, 1836, Pamph. L. 555; yet it was not until the year 1851 that the question of the constitutionality of these Acts was raised before this court in Pocopson Road, 4 Harris, 15, a case from Chester County. The point seems to have been elaborately argued by Mr. P. F. Smith, for the appellant, and many authorities cited; but Mr. Lewis, for appellee, contented himself with citing *Harvey v. Thomas*, 10 Watts, 63. In the short opinion *per curiam*, affirming the proceedings, no notice whatever was taken of the point. In some of our sister States similar Acts have been held to be unconstitutional. *Taylor v. Porter*, 1 Hill, 140; *Cluck v. White*, 2 Swan (Tenn.), 450; *Dickey v. Tennison*, 47 Mo. 373; but their constitutionality was well vindicated in Hickman's Case, 4 Harrington, 580, in which it is said in the opinion of the Supreme Court of Delaware: "It is a part of the system of public roads, essential to the enjoyment of those which are strictly public; for many neighborhoods as well as individuals would be deprived of the benefit of the public highway, but for outlets laid out on private petition and at private cost, and which are private roads in that sense, but branches of the public roads and open to the public for the purposes for which they are laid out." As to lateral railroads, the constitutionality of the Act of May 5, 1832, Pamph. L. 501, was eventually sustained not upon the ground assumed in *Harvey v. Thomas*, 10 Watts, 63, but upon the better reason, that the public had the use of them for the purpose for which they were used. *Hays v. Risher*, 8 Casey, 169; *Brown v. Corey*, 7 Wright, 495; *Keeling v. Griffin*, 6 P. F. Smith, 307. It is not necessary to examine those cases in which, in some of our sister States, Acts authorizing mill-owners to flood the lands of an upper riparian proprietor, on compensation, may have been held good. "They were designed," says Chief Justice Shaw, "to provide for the most useful and beneficial occupation and enjoyment of natural streams and water courses where the absolute right of each proprietor to use his own lands and water privileges at his own pleasure cannot be fully enjoyed, and one must of necessity in some degree yield to the other." *Fiske v. Framingham Man. Co.*, 13 Pick. 68; *Hazen v. Essex Co.*, 12 Cush. 475.

I pass from the argument that this Act is an exercise of the right of eminent domain. I have given more particular attention to it, because it is evidently the ground upon which the lawmakers themselves placed their right to pass the act in question. That respect which is due by this court to the co-ordinate branch of government, made it proper that this point should be fully examined and discussed.

If this Act cannot be sustained on this ground, then it seems clear that it impairs a contract, and is therefore prohibited as well by the Constitution of the United States, Art. I. § 10, as by the Constitution of this Commonwealth, Art. IX. § 17. . . .

Upon the whole, then, we have come to the conclusion that the Act of April 15, 1869, is unconstitutional and void. The particular provisions of this Act seem just and reasonable; but they are not features which affect the character of the Act as contrary to the fundamental law—the *lex legum*. We are bound to look at the principle upon which it is based, and its logical and necessary consequences. As it appears to us, it would overthrow the most valuable barriers which are reared against legislative tyranny, and make all property to be held by a most insecure and uncertain tenure. This Act may be but an entering wedge. Its salutary and conservative restrictions may be repealed hereafter without touching its principle, upon which rests the question of its constitutionality, and every man will then hold his ground-rents, — and the same provision may be extended to other kinds of property, — upon the will of a jury in determining for what price he shall be compelled to sell them.

Judgment reversed.

AGNEW, J. This case has been argued as if the ground-rent owner had been deprived of his property by a taking for private use, contrary to the Constitution of the State. In my judgment this is not the character of the law — it is remedial rather than aggressive. . . .

It does not seek to take the ground-rent from its owner for public or for private use, but simply to transmute an annual sum of money into its equivalent sum of capital, in order that the impolitic, perpetual union of two estates, growing from a single stalk, may be separated for the welfare of the State. Are not the powers of government adequate for this? In thinking and speaking of the power of eminent domain, we are very apt to be controlled in our thoughts by the commonest mode of its exercise, to wit, the taking of land for public use. But this is not its only form. Domain here means dominion, and it is eminent because of its high control. This high power or dominion of the State is not confined to a single mode of exercise, though seldom seen or thought of in others, but is to be found in all those forms grouped under the name of the police power of the State — a power exercised for the welfare of the people, and rendered necessary by the circumstances which affect the common good. . . . I think the law can be impugned only on the ground that it impairs the validity of a contract; and to this extent I agree that it is not competent for the legislature to sever the ground-rent from the land to which it is attached by its contract relation as between the parties to the contract and their immediate privies, to the extent that it is in the power of men to create a perpetuity, but no farther. Beyond this, to carry the sanctity of a contract is to make the act of two individuals rise higher than the powers of government and the interests of the State, and to dominate

both the power of the legislature and the rights of the people. It cannot be that the contracts of a past generation are beyond the reach of law for a proper purpose, a purpose not to destroy, but to change, to suit the interests of the State. Otherwise a contract would stand on a higher platform than that of the people to change their form of government. A change of the State constitution would effect nothing, for the contract standing on the higher ground of the Federal Constitution would still claim its protection, and thus descending on unborn generations, would cling like the fatal shirt of Nessus, until escheat or an earthquake should end it. I think, therefore, that the legislature can sever the rent from the land by a fair valuation and payment in money in the case of a ground-rent deed all of whose parties are dead and more than twenty-one years have elapsed since the death of the last survivor. But as these facts do not appear in this bill and answer, the judgment should be reversed.¹

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LYNCH v. FORBES.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1894.

[37 North Eastern Rep. 437.]

REPORT from Superior Court, Norfolk County; JUSTIN DEWEY, Judge.
Case reserved from Supreme Judicial Court, Norfolk County; JAMES M. MORTON, Judge.

¹ As to a public purpose, see *supra*, pp 901-916; *infra*, pp. 1209-1257.

In *Savannah v. Hancock*, 91 Mo. 54 (1886), BLACK, J., for the court, said: "Section 20, Article 2, Constitution of 1875, provides 'that, whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and, as such, judicially determined, without regard to any legislative assertion that the use is public.' As this is a new section, not found in any of the former constitutions of this State, it may be well to look to the state of the law before its adoption. . . . It will thus be seen that the question whether the use for which the property is about to be taken is a public use, has already been regarded, in this State, as a judicial question, a question which the courts would for themselves decide. Notwithstanding this, it is undeniably true, that the courts were disposed to defer somewhat to a legislative declaration upon the subject. Hence it is said, if the legislature has declared the use, or purpose, to be a public one, its judgment will be respected by the courts, unless the use be palpably private. Dill., Mun. Corp. (3 ed.), sec. 600; Mills on Em. Dom., sec. 10, is to the same effect. Now the constitutional provision of this State, before quoted, makes it the duty of the courts to determine whether the use be a public use, or not, without any regard to a legislative assertion upon the subject. They are freed from the influence of any expressed judgment of the legislature in that behalf, and enjoined to determine the question, wholly regardless of what that branch of the State government asserted upon the subject. The method, however, by which the courts determine whether the use is a public use, remains the same as before. Neither the Constitution, nor any statute, requires that question to be submitted to a jury. The courts will decide the question without the aid of a jury." So Consts. of *Col.*, *Miss.*, and *Washington*. — Ed.

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or unprofit-
able
the use for
the city
the question
necessity
has been decided
by the court*

whether it is a judicial question

The land already taken is not a question to be decided by the court or jury. P'bf. has no constitutional right to have the question of necessity or expediency, in the particular instance submitted

Action by Daniel A. Lynch against Fayette F. Forbes, for trespass to real estate. Defendant justified under Acts 1872, c. 343, and Acts 1888, c. 131, authorizing the town of Brookline to take land for the erection and maintenance of waterworks, and proved that the defendant was the servant and agent of, and acted under the direction of, the selectmen and water board of the town, and was the superintendent and engineer of its water works. The court refused to admit the evidence offered by the plaintiff, or to submit the evidence therein referred to to the jury, but did rule that the question as to whether or not the town had exceeded its authority, and taken more land than it was authorized to take, or any land not within the authority given by said Acts, could not be tested in this suit; that the defendant had shown that the town had conformed to the formal requirements of the statute as to method of taking land, and that defendant's justification was complete, — and directed a verdict for the defendant, and, at request of the parties, reported the case to the Supreme Judicial Court for determination. Judgment on verdict for defendant.

Bill in equity by Daniel A. Lynch against the town of Brookline, praying that the acts of the town in taking plaintiff's land be decreed to be void, and for other relief. The case was reserved, at the request of the parties, for the full court, upon the bill and demurrer. Bill dismissed.

Geo. Fred Williams and *G. W. Anderson*, for plaintiff. *M. & C. A. Williams*, for defendant.

MORTON, J. The principal questions involved in these two cases are the same, and, by agreement of parties, they were argued, and are to be considered, together. The plaintiff contends, in both cases, that the taking was unlawful; and, at the trial of the case in trespass, he offered to show that prior to the taking in question the town had taken all the land that it needed, and that this was not suitable and was not necessary, useful, or proper, for any of the purposes named in the Acts under which it was taken. The plaintiff concedes, what is well settled, that the question whether a necessity exists for the taking of private property for a public use is a legislative, and not a judicial, one. He does not deny that the taking of land for waterworks and a water supply for the general benefit of the inhabitants of a city or town is a taking for a public use; but he contends that where, as here, the authority is given "to take . . . any land or real estate necessary," etc., the question of necessity, so far as it relates to the land actually taken, is one of fact, to be settled by the court or jury. Such has not been deemed to be the law in this State, though it is said, in a work of established authority, that the Constitutions of some of the States require it to be done. *Luul v. New Bedford*, 121 Mass. 286; *Eastern R. Co. v. Boston & M. R. Co.*, 111 Mass. 125; *Dorgan v. Boston*, 12 Allen, 223; *Talbot v. Hudson*, 16 Gray, 417; *Cooley*, Const. Lim. § 538, note. There is no constitutional right on the part of the land-owners, in this State, to have the question of the necessity or expe-

diency of the taking in any particular instance submitted to a court or jury. Holt v. Somerville, 127 Mass. 411. In the absence of any provision in the statutes submitting the matter to a court or jury, the decision of the question lies with the body or individuals to whom the State has delegated the authority to take. They have the same power as the State, acting through any regularly constituted authority, would have. Fall River Iron Works v. Old Colony & F. R. Co., 5 Allen, 226; People v. Smith, 21 N. Y. 597; Boom Co. v. Patterson, 98 U. S. 406; Railway Co. v. Brown, 9 H. L. Cas. 246; Lewis v. Board, 40 Ch. Div. 55; Cooley, Const. Lim. § 538. See Lewis, Em. Dom. § 238, note, for collection of cases. Of course, neither the State nor its delegates can take, under the guise of eminent domain, the property of A. for the purpose of conveying it to B., or for a purpose clearly in excess of, or at variance with, the powers granted. No question of good faith, however, arises here, and the purpose for which the land was taken is within the scope of the Acts authorizing it. The testimony that was offered was therefore rightly excluded, as was also that offered for the purpose of showing that the town was obtaining water from land taken in February, 1889, and that a part, at least, of the water thus taken did not come from the river by percolation. The validity of the taking now in question does not depend on the conduct of the town in regard to another and an earlier taking.

The result is that in the first case the entry must be, "Judgment on the verdict," and, in the second, "Bill dismissed, with costs;" and it is so ordered.

IN Cary Library v. Bliss et al., 151 Mass. 364 (1890), the town of Lexington, in accepting certain propositions from Mrs. Maria Cary for endowing a free public library upon certain terms, if it should be established by that town, proceeded to establish the library, and the trustees received certain gifts from her and other persons for the benefit of the institution. Several years afterwards, and after Mrs. Cary's death, a statute was passed purporting to incorporate a new body (the plaintiff), for carrying out the same purposes, with the assent of the town of Lexington, giving it power "to take and hold . . . the funds and property now held by the trustees of Cary Library," &c. The statute went on to provide that "any person sustaining damages by such taking may have his damages assessed," &c. After holding this statute unconstitutional, as impairing the obligation of contracts, the court (KNOWLTON, J.) said:

"As if apprehensive that the statute, in the parts already considered, was in conflict with the Constitution, the framers of the Act embodied in it a provision for taking the property under the right of eminent domain. Of this property, fifteen hundred dollars was money deposited in a savings bank; and there were two promissory notes of the town of Lexington, amounting to eleven thousand dollars, bearing interest, and payable to the treasurer of the board of trustees.

by another to take it in the same manner for public use. The same public use can not be authorized under the Const.

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"Property can be taken in this way only in the exercise of the paramount right of the government, founded on a public necessity. The question has been somewhat considered whether that necessity can ever extend to the taking of money. In *Burnett v. Sacramento*, 12 Cal. 76, Mr. Justice Field, now of the Supreme Court of the United States, says: 'Money is not that species of property which the sovereign authority can authorize to be taken in the exercise of its right of eminent domain. That right can be exercised only with reference to other property than money, for the property taken is to be the subject of compensation in money itself, and the general doctrine of the authorities of the present day is, that the compensation must be either made, or a fund provided for it in advance.'

"In *Cooley on Constitutional Limitations* (4th ed.) 656, a similar opinion is expressed, and language to the same effect is found in *People v. Brooklyn*, 4 N. Y. 419, 424. \There may be a great public exigency, as in time of war, which will authorize the government to take money in the exercise of this right.\ *Mitchell v. Harmony*, 13 How. 115, 128; *Williams v. Wilkerman*, 44 Misso. 484; *Yost v. Stout*, 4 Cold. 205. But it cannot truly be said that the taking of money by a private corporation, created to administer a public charity, is a taking of property for public use. The money taken must be paid for in money. It cannot be taken unless it is paid for in advance, or sufficient provision is made for immediate payment, which provision must be in money or in that which is deemed its equivalent. There can be no necessity for such a taking. In its nature it is not a taking for a public use. There can be a taking for a public use under this power only when, in the nature of the case, there is or may be, a public necessity for the taking. There cannot be such a necessity in favor of a private corporation, which must provide money to pay for money. For this reason, we are of opinion that the legislature could not authorize the taking of this property by the petitioner.

"The only statement of the use to which the property is to be put is found in the provision of the St. of 1888, c. 342, § 5, that it is 'to be held and applied by the corporation in the same manner as if held by said trustees.' The question arises, whether taking property from one party, who holds it for a public use, by another, to hold it in the same manner for precisely the same public use, can be authorized under the Constitution. Can such a taking be founded on a public necessity? It is unlike taking for a public use property which is already devoted to a different public use. There may be a necessity for that. In the first case, the property is already appropriated to a public use as completely in every particular as it is to be. Can the taking be found to be for the purpose which must exist to give it validity? In every case it is a judicial question whether the taking is of such a nature that it is or may be founded on a public necessity. If it is of that nature, it is for the legislature to say whether in a particular case the necessity exists. We are of opinion that the proceeding authorized

by the statute was in its nature merely a transfer of property from one party to another, and not an appropriation of property to public use, nor a taking which was, or which could be found by the legislature to be, a matter of public necessity. *West River Bridge v. Dix*, 6 How. 507; *Lake Shore & Michigan Southern Railway v. Chicago & Western Indiana Railroad*, 97 Ill. 506; *Chicago & Northwestern Railway v. Chicago & Evanston Railroad*, 112 Ill. 589.

"For these reasons, a majority of the court are of opinion that the St. of 1888, c. 342, is not in conformity with the Constitution of the United States. It follows, that the petitioner has no title to the property in the hands of the trustees of the Cary Library, and that the petition must be dismissed. *Petition dismissed.*"¹

THE GOVERNOR AND COMPANY OF THE CAST PLATE MANUFACTURERS v. MEREDITH ET AL.

KING'S BENCH, 1792.

[4 Durnf. & East, 794.]

THIS was an action upon the case, in which the plaintiffs declared, That before and at the time of committing the grievances mentioned, they were and from thenceforth hitherto have been and still are possessed of a certain messuage, &c. and a certain yard or piece of land, with divers (to wit) three warehouses erected and built thereon, situate on the north side of High-Ground Street, in the parish of Christchurch in Surrey; and also of a certain entrance or gateway leading from the street through and under the messuage into the yard or piece of land;

¹ In *Hammett v. Philadelphia*, 65 Pa. St. 152 (1870), SHARSWOOD, J., for the court, said: "It has been said by Judge Field, of California, now on the bench of the Supreme Court of the United States, that 'money is not that species of property which the sovereign authority can authorize to be taken in the exercise of its right of eminent domain. That right can be exercised only with reference to other property than money, for the property taken is to be the subject of compensation in money itself; and the general doctrine of the authorities of the present day is, that the compensation must be made, or a fund provided for it in advance.' *Burnett v. Sacramento*, 12 Cal. 76. I am not able, and do not feel disposed to enter the lists upon such a question, but it does seem to me that there may be occasions in which money may be taken by the State in the exercise of its transcendental right of eminent domain. Such would be the case of a pressing and immediate necessity, as in the event of invasion by a public enemy, or some great calamity, as famine or pestilence, contributions could be levied on banks, corporations, or individuals. The obligation of compensation is not immediate. It is required only that provision should be made for compensation in the future. Judge Ruggles confines the right to exact money by virtue of the eminent domain to the case where it is for the use of the State at large in time of war. *The People ex rel. Griffin v. Brooklyn*, 4 Comst. 419. I cannot see that there is any such necessary limitation. The public necessity which gives rise to it, prevents its being restrained by any limitations as to either subject or occasion."

Compare *People v. Mayor of Brooklyn*, 4 N. Y. 419, 424. — Ed.

doing raised the level of the pavement to such an extent that wagons could no longer pass through this archway and had to be unloaded in the street

Plfs. were lessees under a long lease of three warehouses where they stored goods. The entrance for loaded wagons to yard was through a narrow gateway 12 ft. high. Dfbs. act under an act of Parl. was raised the grade of the street from 10 ft. to 12 ft. premises and in a

authorities to make compensation, if they do not exceed
their jurisdiction the parties have no remedy.

and which said entrance during all the time aforesaid, until, &c. was used and of right, &c. by the plaintiffs, for the passing and repassing of carts, wagons, and other carriages, in the service of the plaintiffs into and out of the yard or piece of land for the more convenient and beneficial enjoyment and occupation of the yard, and of the warehouses, &c. yet that the defendants on, &c. wrongfully and injuriously raised, &c. the said street, and the soil and pavement thereof, before the said entrance, &c. by placing great quantities of wood, &c. upon the street, &c. there, to a much greater height than the street or the soil and pavement thereof were before raised, (to wit) to the height of four feet more, &c. and so close and near, &c. to the entrance, that it was and still is thereby greatly blocked up and obstructed, insomuch that the carts, &c. employed in the service of the plaintiffs have been and still are thereby prevented from passing and repassing through the entrance, and the plaintiffs are thereby much injured, &c.

The defendants pleaded the general issue; and at the trial at Kingston before GOULD, J. a verdict was found for the plaintiffs with £150 damages, subject to the opinion of this court on the following case.

The plaintiffs were possessed of the premises mentioned in the declaration under a lease for ninety-five years from Christmas, 1777. The warehouses standing in the yard have been used by them since they have been in possession for the depositing and keeping of plate-glass, which is a commodity of large value; and very brittle in its nature. The gateway in question before the committing of the grievance was of the height of twelve feet and one inch, from the old pavement, with which the street in question had been formerly paved; and the gateway was used for the purpose of admitting wagons into the yard, loaded with plate-glass, that they might be unloaded at the door of the warehouses. The defendants, who acted as pavers under the authority of the commissioners, named in an Act passed in the last session, for paving, &c. Upper-Ground Street in the parish of Christchurch in Surrey, and certain other streets, &c. raised¹ the pavement two feet and one inch higher than the old pavement. The gateway in the centre of the arch is only ten feet high from the level of the new pavement, so that the height of the gateway is now reduced two feet and one inch. The defendants soon after the passing of the above Act of Parliament, and before the commencement of the present action, in order to execute the powers and provisions of the said Act, proceeded to take the level of the street, in order to its being paved; and for that purpose they caused a straight and halt line to be drawn in the front of the houses in the street, showing the level and height of the new intended pavement. And about three months afterwards the defendants laid the ground according to such level and agreeably to the line so marked out, and paved the same, which now makes a regular inclined plane with a declination of only one foot of perpendicular height in seventeen feet of

¹ By sect. 13, the commissioners were empowered to cause the said street, &c. to be paved, repaired, raised, sunk, or altered, &c.

length; and it would not be effectual if done in any other way: whereas in the original state the declination was about one foot in twelve, which was a very unsafe declivity for horses and carriages going up or down. The line so made was necessary and proper; and any alteration of the inclined surface of the street less material was not sufficient to render the street safe for carriages passing through. In order to admit carriages as heretofore it will be necessary to take down the arch and heighten the same. The case then stated, that by these means the plaintiffs are deprived of the use of the gateway as they had it before, and wagons and other carriages are prevented passing to their warehouses, and are obliged to be unloaded in the street. It was also proved that the plaintiffs had given notice to the defendants, and also to the commissioners, that unless the buildings were so altered as to enable the plaintiffs to enjoy their warehouses as they did before the Act passed, an action would be brought against them for a satisfaction in damages.

Garrow, for the plaintiffs, relied upon the case of *Leader v. Moxon and Others*,¹ which was directly in point with the present; and established the principle, that the commissioners under such an Act as the present are liable to make good to individuals any actual damage sustained by their acts. And this is founded in good sense, for it could never be supposed to be the intention of the legislature that the avenue to one man's house should be blocked up for the convenience of his neighbors without some compensation.

Fielding, contra, was stopped by the court.

LORD KENYON, Ch. J. If this action could be maintained, every turnpike Act, paving Act, and navigation Act, would give rise to an infinity of actions. If the legislature think it necessary, as they do in many cases, they enable the commissioners to award satisfaction to the individuals who happen to suffer. But if there be no such power the parties are without remedy, provided the commissioners do not exceed their jurisdiction. But it does not seem to me that the commissioners acting under this Act have been guilty of any excess of jurisdiction. Some individuals suffer an inconvenience under all these Acts of Parliament; but the interests of individuals must give way to the accommodation of the public. I doubt the accuracy of the report of the case cited from Wils.; for I cannot conceive that the judges, in considering whether or not the action could be supported, laid any stress on the enormity of the damage sustained by the plaintiff. That circumstance might have induced the jury to increase the damages, if the action could be supported, but could not of itself give a cause of action: that must have depended on the question, whether or not the commissioners exceeded their jurisdiction.

BULLER, J. The question here is, whether or not this action can be maintained? and I am clearly of opinion that it cannot, because a par-

¹ 3 Wils. 461, *vid.* 2 Bl. Rep. 924, s. c. [See *ante*, 673, n. — Ed.]

particular remedy is pointed out by the Act.¹ If there had been no clause in the Act empowering the commissioners to give satisfaction to the party grieved, I am by no means satisfied that, on the broad principle stated by the plaintiffs' counsel, any action could be maintained. There are many cases in which individuals sustain an injury, for which the law gives no action; for instance, pulling down houses, or raising bulwarks, for the preservation and defence of the kingdom against the king's enemies. The civil law writers indeed say, that the individuals who suffer have a right to resort to the public for a satisfaction: but no one ever thought that the common law gave an action against the individual who pulled down the house, &c. This is one of those cases to which the maxim applies, *salus populi suprema est lex*. If the thing complained of were lawful at the time, no action can be sustained against the party doing the act. In this case express power was given to the commissioners to raise the pavement; and, not having exceeded their power, they are not liable to an action for having done it.

GROSE, J. The clause in the act which empowers the commissioners to award satisfaction, is decisive against this action.

Postea to the defendants.

CALLENDER v. MARSH.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

[1 Pick. 418.]

This was an action of trespass on the case for digging down the streets by the plaintiff's dwelling house, in Boston, and taking away the earth, so as to lay bare the foundation walls of the house and endanger its falling; in consequence of which the plaintiff was obliged, at great expense, to build up new walls, and otherwise secure the house, and render it safe and convenient of access, as before.

The defendant pleaded the general issue, and filed a brief statement, pursuant to the statute, in which he set forth his appointment and qualification as surveyor of the highways for the city of Boston, the condition of the street, and the purposes for which the acts complained of were done.

At the trial before PARKER, C. J., the plaintiff proved the digging down of the streets, as stated in his declaration, and gave evidence of the trouble and inconvenience which he had suffered in consequence. His house was built about twenty years ago, the streets having been previously laid out.

¹ The 46th section authorized the commissioners "to make any allowance, or pay part of the expenses incurred by the proprietors of any such house or building, in removing any of the obstructions, nuisances, or annoyances, as aforesaid, in such cases where the proprietors should or might be materially injured on account of the pavement being necessarily raised or lowered, and whereby such cases might be particularly entitled to some compensation."

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See page 1056

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that the condition of the
road was such as to necessitate a changing of the grade in

to the selectmen and approved by other surveyors,
for reducing the grade. The selectmen had
not directly authorized

The defendant proved, by the certificate of the city clerk (which evidence was not objected to), that he was appointed one of the surveyors of highways on the 13th of May, 1822, and that he was sworn into office on the 17th of the same month. No limits were assigned to the surveyors respectively by the city government. The defendant also proved, that he did the acts complained of in virtue of his supposed authority as surveyor. Before he began the digging, he consulted with Babcock, the only other acting surveyor at the time, and after the appointment of Cotton, with him also; having begun the work before Cotton was appointed. He also proved, that for a year or two preceding, propositions had been made to the selectmen for levelling and digging down the streets, and that plans and levels had been taken for that purpose, with a view to reduce the slope, which was so steep as to render it difficult to pass up and down the streets with carts and carriages. No order of the selectmen or of their successors, the mayor and aldermen, on this subject was offered in evidence, nor did it appear that either of those boards had acted thereon, in any other manner than by appointing a committee to take care of the streets. This committee was frequently present during the performing of the acts complained of, and approved of them; and the bills of some of the workmen were rendered to the city officers and by them passed.

A verdict was taken for the plaintiff, subject to the opinion of the whole court.

J. T. Austin, for the defendant; Davis, Solicitor General, and Rand, for the plaintiff.

The opinion of the court was delivered at the following November term, by

PARKER, C. J. . . . The counsel for the plaintiff have, with laudable diligence, looked into the civil law, to see what course was pursued in ancient times respecting public roads, presuming that on a subject of such common concern the principles adopted by all governments in all times would be nearly the same; and although our own statutes are to be the sole guide of decisions in matters altogether of a local nature, it is well enough to see whether any information can be drawn from so ancient a source, in regard to the use and meaning of terms employed by our own legislature.

The general care of the roads was in the *Ædiles*; who probably exercised the power and jurisdiction which is given by our statutes to the court of sessions. These appointed subordinate agents for the care of roads within the city, who were called *quatuor viri* from their number; and to the *duum viri* was given the care of the roads without the city. These officers probably answered to the character of our surveyors. The first were called *quatuor viri, viis urbanis curandis*; the second, *duum viri, viarum publicarum extra urbem curatores*. Their duty was among other things *adæquare*, to level the highways, and to construct bridges when necessary. Each individual citizen was obliged to make certain repairs near his own house, as our citizens are

to a forfeiture of that land in future, so one who owns
land on a highway takes subject to the right of the state
to change the grade of the street. The public have the right
to change the grade of the street sufficiently to

provision for compensation the appeal is to the legislature and not to the courts.

obliged to make and keep in repair the sidewalks. The interdict which was quoted in the argument, viz. *Interdictum hoc perpetuo dabitur, et omnibus et in omnes*, &c. related to private persons, not to any of the above-named public officers. *Heinecc. sec. Ord. Pand. part. 1, § 74; D. 1, 2, 2, 30; D. 43, tt. 10, 11, 19, et notis.*

No inference can be drawn from these provisions in favor of the plaintiff in the present action, as it does not appear that any means were provided of indemnifying those who might be put to charge or expense in consequence of the necessary repair of the highways; nor does it appear that the levelling a way already laid out was a subject of adjudication on which persons bordering on the road were parties, having a right to claim compensation. And indeed if such were the provisions of the Roman law, it is difficult to perceive how they could be introduced into ours by any other power than the legislature. We have only to look at our statutes, and we think they explicitly and clearly give the power to the surveyors, which was exercised by the defendant in the case before us.

But it is said, if such be the construction of the statute, the legislature exceeded its constitutional powers, and that the defendant therefore cannot justify under the statute. This objection is founded upon the last clause in the 10th article of the Declaration of Rights, which provides "that whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor."

There has been no construction given to this provision, which can extend the benefit of it to the case of one who suffers an indirect or consequential damage or expense, by means of the right use of property already belonging to the public. It has ever been confined, in judicial application, to the case of property actually taken and appropriated by the government. ¶ Thus, if by virtue of any legislative Act the land of any citizen should be occupied by the public for the erection of a fort or any public edifice upon it, without any means provided to indemnify the owner of the property, the title of the owner could not be divested thereby, and he might maintain his action for possession, or of trespass, against those who are instrumental in the act; because such a statute would be directly contrary to the above cited provision; and as no action can be maintained against the public for damages, the only way to secure the party in his constitutional rights would be to declare void the public appropriation. ¶ It is upon this principle that the legislature have, in the general law respecting highways, and in their numerous Acts authorizing the making of turnpikes, bridges, canals, etc., provided that the party, whose property is taken to carry into effect these purposes, shall be indemnified and have secured to him an eventual trial by jury on the question of damage, if no compromise shall be made by the several parties. But this course has been confined to the direct loss of property sustained by the individual, and such expenses as are necessarily incident to the very act of taking it.

The streets on which the plaintiff's house stands had become public property by the act of laying them out conformably to law, and the value of the land taken must have been either paid for, or given to the public, at the time, or the street could not have been legally established. Being legally established, although the right or title in the soil remained in him from whom the use was taken, yet the public acquired the right, not only to pass over the surface in the state it was in when first made a street, but the right also to repair and amend the street, and for this purpose, to dig down and remove the soil sufficiently to make the passage safe and convenient. Those who purchase house-lots bordering upon streets are supposed to calculate the chance of such elevations and reductions as the increasing population of a city may require, in order to render the passage to and from the several parts of it safe and convenient, and as their purchase is always voluntary, they may indemnify themselves in the price of the lot which they buy, or take the chance of future improvements, as they shall see fit. The standing laws of the land giving to surveyors the power to make these improvements, every one who purchases a lot upon the summit, or on the decline of a hill, is presumed to foresee the changes which public necessity or convenience may require, and may avoid or provide against a loss.

That this has been the practical construction of our statute we can entertain no doubt; for many instances must have occurred within our principal towns, of streets raised or reduced in such manner as to occasion expense to borderers, and no claim of damages has ever been heard of; and in the country towns it is not unusual to level roads, so as to oblige the owners of fields to rebuild their fences or stone-walls, and no complaint has been made.

There are cases, without doubt, where an individual may suffer by the exercise of this power, and thus be made involuntarily to contribute much more than his proportion to the public convenience; but such cases seem not to be provided for, and must be left to that sense of justice which every community is supposed to be governed by.

A fort may be erected on public ground so near to a man's dwelling-house as materially to reduce its rent and value; the public would not be bound to indemnify the suffering party, for when he built so near to unoccupied ground, which the public had a right to occupy for any purpose its exigencies might require, he should have foreseen the possible purpose to which it might be applied, and should have guarded against a future loss, by abstaining from building there. So the location of school-houses upon public land may materially diminish the value of an adjoining or opposite dwelling-house, on account of the crowd and noise which they usually occasion; but it cannot be imagined that the public are obliged to consult the convenience of the individual so far as to abstain from erecting the school-house, or to pay the owner of the dwelling-house for its diminished value. These are cases of *dammum sine injuria*, and though proper for the favorable interposition

of the community for whose benefit the individual suffers, they do not give a right to demand indemnity, by virtue of the above cited article in the Declaration of Rights.

The case of highways or public streets is analogous; when rightfully laid out, they are to be considered as purchased by the public of him who owned the soil, and by the purchase the right is acquired of doing everything with the soil over which the passage goes, which may render it safe and convenient; and he who sells may claim damages, not only on account of the value of the land taken, but for the diminution of the value of the adjoining lots, calculating upon the future probable reduction or elevation of a street or road; and all this is a proper subject for the inquiry of those who are authorized to lay out, or of a jury, if the parties should demand one. (And he who purchases lots so situated, for the purpose of building upon them, is bound to consider the contingencies which may belong to them.

Cases apparently hard will occur; the present is such a one. The plaintiff's house has been standing twenty years, and he had reason to expect, that in any contemplated improvement in the streets his liability to expense would have been attended to by the city authorities, who, had they forbidden the surveyor to proceed, even if they had no legal right to restrain him, would have exposed him to an opinion of the jury that his proceedings were unnecessary and wanton, and so subjected him to damages; but there being no such interposition, on the contrary, the other surveyors having concurred in the act, the committee of the board of aldermen knowing and approving it, it is impossible for us to find the surveyor guilty of a wrong; it not being denied that the acts done have rendered the streets more safe and convenient than they were before. It may be a case very suitable for the consideration of the city authorities, whether according to the practice in like cases of improvements designed for the general good necessarily creating expense to individuals, some fair indemnity ought not to be allowed; but of this they are the judges. If it is not now within the authority of the city officers, it is certainly worthy consideration, whether an application to the legislature ought not to be made, to authorize them to indemnify those citizens who may, in the necessary exercise of powers used for public improvement or convenience, be made indirectly to contribute an undue proportion for those purposes; and there seems to be no good reason why others, whose property is enhanced in value at their neighbor's expense, should not be held to furnish part of the indemnity. If the reducing or raising of streets which have been laid out for a definite number of years, and on which houses have been erected, should be made a matter of adjudication, like that of altering, widening, or turning a street, subject to the same provision for damages, the mischief would be cured; for although, theoretically, all this may be considered as determined when the street is originally laid out, yet practically there may be cases where this just provision has been overlooked.

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We do not find in any of the cases cited, or in any authorities presented to our consideration, anything which impugns the opinion we have adopted. The passages from Dalton only show that the law in respect to highways and the duty and power of surveyors is nearly the same in England as with us. Without doubt our statutes were framed with reference to the common law and statutes of England. Whenever a new road or way is to be laid out, or an existing one enlarged or widened, provision is made for indemnity. The inquiry of damages on a writ of *ad quod damnum*, or by jury summoned by the quarter sessions, is applicable only to such cases. So by our statutes the compensation is given, when a road is laid out, or turned, or altered, or discontinued, but in no other case; and this compensation is for the land taken, or for the immediate expense consequent upon the act. Levelling a road is not anywhere found to be considered an alteration of it; nor do we find that the injury it may produce has been compensated, unless it be in the case of *Leader v. Moxon*, 3 Wils. 461, which case is spoken of with disapprobation by Lord Kenyon and Mr. Justice Buller in a subsequent case in 4 D. & E. 794, and the principle of it overruled. Indeed in a report of the same case by Sir W. Blackstone, vol. 2, p. 926, it is stated that the commissioners had grossly exceeded their authority; which seems, according to this last report, to have been the principal ground of the decision.

We can perceive no difference in the principle on which this action is founded and that which was involved in the case of *Thurston v. Hancock*, 12 Mass. Rep. 220; and the decision in that case was approved of and adopted by the Supreme Court of New York in the case of *Panton v. Holland*, 17 Johns. Rep. 100.

That it might be proper for the legislature, by some general Act, to provide that losses of the kind complained of in this suit should be compensated by the town or city within which improvements may be made for the public good, or by the owners of land which may be particularly benefited, is not for us to deny; but without such legislative provision we have no authority upon the subject, it being clear that by the common law, as well as by our statutes, the defendant in this action is not liable to damages. In no case can a person be liable to an action as for a tort, for an act which he is authorized by law to do; and as the statute authorizes surveyors to amend roads and streets by digging them down and building them up where necessary, the legislature not being prohibited by the Constitution from enacting such a statute, we think the defendant is entitled to judgment.

*Verdict set aside and a nonsuit entered.*²

¹ The legislature acted upon this suggestion. See St. Mass. 1825, c. 171, s. 5, Mass. Rev. St. c. 43, s. 14, and Pub. St. Mass. c. 49, s. 14. — Ed.

² And so *Woodbury v. Beverly*, 153 Mass. 245; *Proctor v. Stone*, 158 Mass. 564 (1893), *Mon. Nav. Co. v. Coons*, 6 W. & S. 101, 109 (1843); *Brookes v. Cedar Brook Co.*, 82 Me. 1 (1889); *Ravenstein v. N. Y. L. & W. R. Co.*, 136 N. Y. 528 (1893). In *City Council v. Maddox*, 89 Ala. 181 (1890), the effect of a change in the State Constitution is stated. Compare *Transp. Co. v. Chicago*, 99 U. S. 635; s. c. *infra*, p. 1081; *Randolph, Em. Dom.* § 398. — Ed.

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O'CONNOR v. PITTSBURGH.

SUPREME COURT OF PENNSYLVANIA. 1851.

[18 Pa. 187.]

ERROR to the District Court of Allegheny County.

This was an action of trespass on the case, brought by the Right Reverend Michael O'Connor, Roman Catholic Bishop of Pittsburgh, for the use of the Roman Catholic congregation of St. Paul's Church, Pittsburgh v. The Mayor, Aldermen, and Citizens of Pittsburgh.

The action was brought to November Term, 1849, in the court below, to recover damages from the city of Pittsburgh for injuries done to the Cathedral, by cutting down Grant and Fifth streets, in that city. The bishop held the title of the property in trust for the Roman Catholic congregation of St. Paul's Church, Pittsburgh. . . .

The jury returned a verdict on two of the counts in the declaration in favor of the plaintiff for the sum of \$1,000 damages; notwithstanding which LOWRIE, J., subsequently entered judgment on a reserved question for the defendants. . . .

Error was assigned, *inter alia*, to the entry of the judgment.

The case was argued by McCandless and Loomis, for the plaintiff in error. Kuhn, for the city.

The opinion of the court, filed November 24, 1851, was delivered by GIBSON, C. J. We have had this cause re-argued in order to discover, if possible, some way to relieve the plaintiff consistently with law; but I grieve to say we have discovered none. To the Commonwealth here, as to the king in England, belongs the franchise of every highway as a trustee for the public; and streets regulated and repaired by the authority of a municipal corporation are as much highways as are rivers, railroads, canals, or public roads laid out by the authority of the quarter sessions. In England a public road is called the king's highway; and though it is not usually called the Commonwealth's highway here, it is so in contemplation of law, for it exists only by force of the Commonwealth's authority. Every railroad, canal, turnpike, or bridge company has its franchise by grant from the State, and consequently with its original qualities and immunities adhering to it. Every highway, toll or free, is licensed, constructed, and regulated by the immediate or delegated action of the sovereign power; and in every Commonwealth the people in the aggregate constitute the sovereign. But it is the prerogative of a sovereign to be exempt from coercion by action: for jurisdiction implies superiority, and a sovereign can have no superior. At the declaration of American independence, prerogatives which did not concern the person, state, and dignity of the king, but such as had been held by him in trust for his subjects, were assumed by the people here and exercised immediately by themselves; among the rest, unwisely I think, the prerogative of refusing

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to do justice on compulsion. That a suit cannot be maintained against the State without its consent, is shown by the statute which enabled Pennsylvania claimants to sue the State for the value of the lands ceded to Connecticut claimants within the seventeen townships in Luzerne County. (But this prerogative would be unavailing if it could not protect the agents whom the Commonwealth has necessarily to employ.) It was applied to the protection of a private corporation in the *Monongahela Navigation v. Coons*, and *Henry v. The Allegheny Bridge*; in which it was held that a chartered company to improve the navigation of a public highway, or to build a bridge, is not answerable for consequential damages; and it was applied to the protection of a municipal corporation in *Green v. The Borough of Reading*, *The Mayor v. Randolph*, and *the Philadelphia and Trenton Railroad*; to which may be added every decision on the subject in our sister States, except the decisions in Ohio, which, however founded in natural justice, are not founded in the law which prevails elsewhere.

Yet it must be admitted that, while it is inequitable to injure the property of an individual for the benefit of the many, it would be impossible for a corporation to bear the pressure of successive common-law actions for the continuance of a nuisance, each verdict being more severe than the preceding one. The modification of the remedy would be for the legislature, which can turn compensation for a permanent detriment into the price of a prospective license; but to attain complete justice, every damage to private property ought to be compensated by the State or corporation that occasioned it, and a general statutory remedy ought to be provided to assess the value. The constitutional provision for the case of private property taken for public use, extends not to the case of property injured or destroyed; but it follows not that the omission may not be supplied by ordinary legislation. No property was taken in this instance; but the cutting down of the street consequent on the reduction of its grade left the building useless, and the ground on which it stood worth no more than the expense of sinking the surface of it to the common level. The loss to the congregation is a total one, while the gain to holders of property in the neighborhood is immense. The legislature that incorporated the city never dreamt that it was laying the foundation of such injustice; but, as the charter stands, it is unavoidable.

Judgment affirmed.¹

¹ In *O'Brien v. Philadelphia*, 150 Pa. 589 (1892), in a like case, the court, STERRETT, J., said: "If any regard is to be had for the constitutional mandate [Const. 1874, Art. xvi s 8] that 'municipal and other corporations . . . shall make just compensation for property taken, injured, or destroyed by the construction or enlargement of their works, highways, or improvements,' we are at a loss to see how the learned judge could do otherwise than decide the reserved question as he did. Nobody conversant with the history of the constitutional provision above quoted can entertain any doubt that it was intended to provide, *inter alia*, for the class of cases of which *O'Connor v. Pittsburgh*, 18 Pa. 187, is a conspicuous example. It has uniformly been so regarded from the date of its adoption until the present time. . . . In *Ogden v. Phila-*

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IN *Peart et al. v. Meeker* (45 La. Ann.), 12 Southern Rep. 490 (1893), in reversing a judgment for the plaintiff, who complained of the acts of the defendant, President of a Levee District, in locating and constructing a line of levee on the Red River, the court (FENNER, J.) said: "The quantum of damages is admitted between the parties, and the

delphus, 143 Pa. 430, the claim was for damages caused by grading North Street. After stating that the undisputed facts were 'that the first grade . . . was established on the city plan in 1871, but nothing was done on the ground until 1887,' our Brother Mitchell says 'For the establishment of the grade of 1871 there was no right of action. *O'Connor v. Pittsburgh*, 18 Pa. 187; *Philadelphia v. Wright*, 100 Pa. 235. Therefore the Statute of Limitation could not begin to run from that date. But the Constitution of 1874, Article xvi. s. 8, gave a right to owners to have compensation for property injured, as well as for property taken by municipal and other corporations in the construction or enlargement of their works.'"

In *Smith v. Washington*, 20 How. 135, 148 (1857), the defendant city was sued in an action on the case to recover damages for an alteration of the grade of the street on which the plaintiff had his dwelling-house. In sustaining a judgment of the Circuit Court of the United States for the District of Columbia in favor of the defendant, the court (GRIER, J.) said: "Having performed this trust, confided to them by the law, according to the best of their judgment and discretion, without exceeding the jurisdiction and authority vested in them as agents of the public, and on land dedicated to public use for the purposes of a highway, they have not acted 'unlawfully or wrongfully,' as charged in the declaration. They have not trespassed on the plaintiff's property, nor erected a nuisance injurious to it, and are, consequently, not liable to damages where they have committed no wrong, but have fulfilled a duty imposed on them by law as agents of the public. The plaintiff may have suffered inconvenience and been put to expense in consequence of such action; yet, as the act of defendants is not 'unlawful or wrongful,' they are not bound to make any recompense. It is what the law styles *damnum absque injuria*. Private interests must yield to public accommodation; one cannot build his house on the top of a hill in the midst of a city, and require the grade of the street to conform to his convenience at the expense of that of the public. The law on this subject is well settled, both in England and this country. The cases are too numerous for quotation; a reference to one or two more immediately applicable to the questions arising in this case will be sufficient.

"In *Callender v. Marsh*, 1 Pick. 417, the defendant, as surveyor of the highways, was charged with digging down a street in Boston, so as to lay bare the foundations of plaintiff's house, and endanger its falling. The authority under which he acted was given by a statute which required 'that all highways, townways, etc., should be kept in repair and amended from time to time, that the same may be safe and convenient for travellers.' 'This very general and exclusive authority,' say the court, 'would seem to include everything which may be needed towards making the ways perfect and complete, either by levelling them where they are uneven and difficult of ascent, or raising them where they should be sunken and miry.' It was held, also, that the law does not give a right to compensation for an indirect or consequential damage or expense, resulting from a right use of property belonging to the public.

"In *Green v. The Borough of Reading*, 9 Watts, 282, the defendants, by virtue of their authority to 'improve and repair,' graded the street in front of plaintiff's house five feet higher than it had been before, and it was held that the corporation was not liable to an action for any consequential injury to plaintiff's property by reason of such improvement or change of grade in the public street.

"In the case of *O'Connor v. Pittsburgh*, 18 Penn. Rep. 187, a church had been built according to the direction of the city regulator, and by a grade established in 1829. Afterwards, in pursuance of an ordinance, the grade of the street was reduced seven feet; the church had to be taken down and rebuilt on a lower foundation, at a damage of \$4,000. The authority given to the city was 'to improve, repair, and keep

sole question before us is the legal liability of defendant. Whatever may be the law elsewhere, we consider the law of Louisiana too well settled to admit of further dispute to the following effect: That under article 665 of our Civil Code riparian property on navigable rivers in this State is subject to a servitude or easement imposed by law for the public or common utility, authorizing the appropriation by the government, under proper laws, of the space required for the making and repairing of levees, roads, and other public works; that the State is charged with the administration of this public servitude; that in locating and building levees she does not expropriate the property of the citizen, but lawfully appropriates it to a use to which it is subject under the title itself; that in so doing she acts, not under the power of eminent domain, but in the exercise of the police power; that laws, constitutional or statutory, concerning the expropriation of private property for public use, and requiring adequate compensation therefor, have no application to property legitimately required for levee purposes, and that private injury resulting from the legitimate exercise of this legal right is *dammum absque injuria*, to which the individual must submit as a sacrifice to the public safety and welfare. *Ruch v. City of New Orleans*, 43 La. Ann. 275, 9 South. Rep. 473; *Bass v. State*, 34 La. Ann. 494; *State v. Maginnis*, 26 La. Ann. 558; *Cash v. Whitworth*, 13 La. Ann. 401; *Dubose v. Commissioners*, 11 La. Ann. 165; *Police Jury v. Bozman*, 11 La. Ann. 94; *Zenor v. Concordia*, 7 La. Ann. 150. It is useless to quote from these decisions. They are familiar to the profession, and their tenor, as above stated, is unambiguous, harmonious, and emphatic. They were rendered under the régime of constitutions which prohibited the taking of private property for public purposes without compensation; and, however broad and emphatic may be the same prohibition in our existing constitution, it had not either the intention or effect to repeal Article 665 of the Civil Code, or to bring within its grasp the lawful appropriation of property for levee purposes. On the contrary, the Constitution itself charges the General Assembly with the duty of maintaining a levee system, authorizes the creation of levee districts under the administration of commissioners to be appointed or elected, and grants specified powers of taxation for this purpose. Const. arts. 213-216. In the execution of these powers and duties, the Red River, Atchafalaya & Bayou Boeuf Levee District was created by Act 79 of 1890, amended and re-enacted by Act 46 of 1892, and the defendant commissioners were appointed. . . . The Constitution itself (Article 214), in authorizing the appointment of commissioners for levee districts, expressly declares that they 'shall in

in order the streets,' etc. The court say, 'We had this case re-argued in order to discover, if possible, some way to relieve the plaintiff consistently with law, but grieve to say we can find none. The law is settled, not only in Pennsylvania, but by every decision in the sister States, except one.'

"We are of opinion, therefore, that the instructions given by the court below on these points were correct, and affirm their judgment."—Ed.

is subject under the title itself. That in so doing the title acts, not under the power of eminent domain, but in the exercise of the police power. *Dammum absque injuria*, 1

the method and manner to be provided by law, have supervision of the erection, repair, and maintenance of the levees in said districts.' These commissioners were therefore bound, under an express constitutional mandate, to exercise their functions exclusively 'in the method and manner' prescribed by law. The law confined their powers to the construction, maintenance, and repair of such levees only as, 'in the opinion of the Board of State Engineers, will protect said levee district from overflow,' and further devolves upon the State Engineers the exclusive authority and duty 'to survey and locate, repair or remove and change all levees,' and further charges said engineers with the full 'responsibility of all such location.'

"The evidence in the case fully establishes that the levee complained of is built on the line surveyed, located, approved by the State Engineers. . . . What was the board to do? The levee was an important one, involving the protection of an extensive region from overflow. Under the mandates of law above referred to its duty was clear and manifest to build the levee on the line located by the State Engineers, who are charged with the authority, duty, and responsibility of making such location. It is difficult to understand how this corporation can incur liability for performing the plain duty imposed on it by law, or how, in any event, the corporate funds could be used in satisfaction of such liability. It is clear that the commissioners, even if they desired to do so, could not, under section 11, devote the corporate funds to the satisfaction of plaintiff's claim, without violating the law, and the judicial power could not be invoked to compel them to violate the law. To hold otherwise would be to authorize such officers to create unwarranted debts against this corporation, which is a mere functionary of the State, and for their payment to divert public funds from the purposes to which they are lawfully and exclusively dedicated. Whatever be the rights of plaintiff, and whatever be her remedies for their vindication, the latter cannot possibly take the shape of an action of damages against this corporation. The law under which the officers of this corporation and the State Engineers have acted is a valid law, and nothing done in the proper execution of its mandates can give rise to any action of damages. If such an action exists, it must arise from acts of these officers in violation of the authority conferred upon them. This brings the case within the dilemma propounded in Bass' Case, where we said: 'The dilemma seems irresistible: Either the Board of Engineers, the public agents of the State, have acted within the scope of their mandate and authority, or they have not. If they have, then, as they have carried out a valid law, neither they nor the State can be held responsible. If they have acted beyond that scope, their principal cannot be made responsible for their unauthorized act, and they alone are chargeable.' *Bass v. State*, 34 La. Ann. 494. For the reasons heretofore indicated we think the corporate liability of this levee district is governed by the same rules which apply to the State herself. If there is any liability for damages it rests on the officers individually

who have acted in excess of their authority, and under the law in this case, which we have heretofore quoted, it seems quite clear that, as between these commissioners and the State Engineers, the latter alone would be charged with whatever responsibility might result from the improper location of the levees. We need not advert to the strong shield of protection which the law extends over public officers charged with discretionary duties, and which exempts them from liability for honest errors, and except in clear cases of oppression and injustice; and it is only proper to say that nothing in this record indicates any but honest motives and conscientious action on the part of all the public officers concerned. It is undoubtedly the duty of the public officers charged by the State with the execution of its police power, to make no greater sacrifice of private rights than the public welfare demands. In several cases this court has said that power so conferred is not arbitrary, and that the citizen is not without remedy to subject it to judicial control in proper cases. We are not called upon in this case to consider this question further than to say that the present action of damages against this levee district is not an appropriate remedy, and cannot be sustained. It is therefore decreed that the judgment appealed from be reversed, and that plaintiff's demand be rejected, at her costs in both courts." ¹

¹ The exact scope and limitations of property rights may, of course, differ materially in different States. Compare the doctrine of the Appropriation of Waters in the Pacific and adjacent States, by which a permanent right to running water, even as against riparian owners, is acquired by actual prior appropriation to mining or any other useful purposes. See Black's edition of Pomeroy's Water Rights.

In *Drake v. Earhart*, 2 Idaho, 716, 720 (1890), BEATTY, C. J., for the court, said: "The important question, for the settlement of which this appeal was chiefly brought, is what, if any, rights the appellant has to any of that water as a riparian proprietor. His claim is not based upon prior or any appropriation under our territorial laws, but upon the fact that the stream in question flows by its natural channel through his lands; hence, that he is entitled to the use thereof allowed by the common law. This doctrine of riparian proprietorship in water as against prior appropriation has been very often discussed, and nearly always decided the same way by almost every appellate court between Mexico and the British possessions, and from the shores of the Pacific to the eastern slope of the Rocky mountains, as well as by the Supreme Court of the United States. But for the fact that it has elsewhere repeatedly appeared in the same court, it would seem surprising that it should now be seeking another solution in this. While there are questions growing out of the water laws and rights not fully adjudicated, this phantom of riparian rights, based upon facts like those in this case, has been so often decided adversely to such claim, and in favor of the prior appropriation, that the maxim, 'first in time, first in right,' should be considered the settled law here. Whether or not it is a beneficent rule, it is the lineal descendant of the law of necessity. When, from among the most energetic and enterprising classes of the east, that enormous tide of emigration poured into the west, this was found an arid land, which could be utilized as an agricultural country, or made valuable for its gold, only by the use of its streams of water. The new inhabitants were without law, but they quickly recognized that each man should not be a law unto himself. Accustomed, as they had been, to obedience to the laws they had helped make, as the settlements increased to such numbers as justified organization, they established their local customs and rules for their government in the use of water and land. They found a new condition of things. The use of water to which they had been accustomed, and the laws concern

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PUMPELLY v. GREEN BAY COMPANY.

SUPREME COURT OF THE UNITED STATES. 1871:

[13 Wall. 166.]

ERROR to the Circuit Court of the United States for the District of Wisconsin; the case being thus:

The Constitution of Wisconsin ordains that "the property of no person shall be taken for public use without just compensation therefor."

With this provision in force as fundamental law, one Pumpelly, in September, 1867, brought trespass on the case against the Green Bay and Mississippi Canal Co. for overflowing 640 acres of his land by means of a dam erected across Fox River, the northern outlet of Lake Winnebago, by which, as the declaration averred, the waters of the lake were raised so high as to forcibly and with violence overflow all his said land, from the time of the completion of the dam in 1861 to the commencement of this suit; the water coming with such a violence, the declaration averred, as to tear up his trees and grass by the roots, and wash them, with his hay by tons, away, to choke up his drains and fill up his ditches, to saturate some of his lands with water, and to

ing it, had no application here. The demand for water they found greater than the supply, as is the unfortunate fact still all over this arid region. Instead of attempting to divide it among all, thus making it unprofitable to any, or instead of applying the common-law riparian doctrine, to which they had been accustomed, they disregarded the traditions of the past, and established as the only rule suitable to their situation that of prior appropriation. This did not mean that the first appropriator could take all he pleased, but what he actually needed, and could properly use without waste. Thus was established the local custom, which pervaded the entire west, and became the basis of the laws we have to-day on that subject. Very soon these customs attracted the attention of the legislatures, where they were approved and adopted, and next we find them undergoing the crucial test of judicial investigation. As far back as 1855, the Supreme Court of California, in Irwin v. Phillips, 5 Cal. 145, and in Tartar v. Mining Co., Id. 397, distinctly held that the prior appropriator of water should hold it against the riparian claim of the owner of land through which it flowed, and, also, that in all branches of industry the prior appropriator of land, water, and easements would be protected. Not only had such become the law by custom, by the legislative will, and the decisions of the courts, without dissent, but the general government, for many years, without protest, acquiesced in such occupation and use of its lands and waters by its citizens, while valuable properties and industries were building upon this principle. To put the question beyond uncertainty, to approve and adopt what already existed as the common law of the west, the Congress, by its Act of July 26, 1866, § 9, provided 'that whenever, by priority of possession, rights to the use of water for mining, agriculture, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same.' It will be observed that the act is based upon the existence of local customs, laws, and decisions of courts. It is not necessary that all these conditions shall exist for the protection of the right; but, as held in Basey v. Gallagher, 20 Wall. 684, the existence of either condition is sufficient."

Compare Stowell v. Johnson et al., 7 Utah 215, Strickler v. Col. Springs, 25 Pac. Rep. (Col.) 313. — Ed.

and therefore the deft. had the right under legislative authority to build and continue the dam without being legally responsible for any injuries done by the raising

stream it is a taking of private property within the meaning of the decision and the const. of Wis.

dirty and injure other parts by bringing and leaving on them deposits of sand, and otherwise greatly injuring him. The canal company pleaded six pleas, of which the second was the most important, but of which the fourth and sixth may also be mentioned.

This second plea was divisible, apparently, into two parts.

The first part set up (quoting it entire) a statute of Wisconsin Territory, approved March 10th, 1848, by which one Curtis Reed and his associates were authorized to construct a dam across Fox River, the northern outlet of Winnebago Lake, to enable them to use the waters of the river for hydraulic purposes. . . .

A general demurrer to these three pleas being overruled by the court, the plaintiff brought the case here.

Messrs. B. J. Stevens and H. L. Palmer, in support of the ruling below.

Messrs. J. M. Gillet and D. Taylor, contra.

MR. JUSTICE MILLER delivered the opinion of the court. . . .

As we are of opinion that the statute did not authorize the erection of a dam which would raise the water of the lake above the ordinary level, and as the plea does not deny that the dam of the defendant did so raise the water of the lake, we must hold that, so far as the plea relies on this statute as a defence, it is fatally defective.

But this same plea further alleges that the Legislature of Wisconsin, after it became a State, projected a system of improving the navigation of the Fox and Wisconsin rivers, which adopted the dam of Reid and Doty, then in process of construction, as part of that system; and that, under that Act, a board of public works was established, which made such arrangements with Reid and Doty that they continued and completed the dam; and that by subsequent legislation, changing the organization under which the work was carried on, the defendants finally became the owners of the dam, with such powers concerning the improvement of the navigation of the river as the legislature could confer in that regard. But it does not appear that any statute made provision for compensation to the plaintiff, or those similarly injured, for damages to their lands. So that the plea, as thus considered, presents substantially the defence that the State of Wisconsin, having, in the progress of its system of improving the navigation of the Fox River, authorized the erection of the dam as it now stands, without any provision for compensating the plaintiff for the injury which it does him, the defendant asserts the right, under legislative authority, to build and continue the dam without legal responsibility for those injuries.

And counsel for the defendant, with becoming candor, argue that the damages of which the plaintiff complains are such as the State had a right to inflict in improving the navigation of the Fox River, without making any compensation for them.

This requires a construction of the Constitution of Wisconsin; for though the Constitution of the United States provides that private property shall not be taken for public use without just compensation, it

Wisconsin cases. Was this my property substance

when real estate is actually invaded by one of the riparian owners only so that the water runs over the land in a natural course. It is a taking of property in the constitutional sense. #. Sup. Ct. instructed that there was a taking of property. It is good then the property was taken. The Sup. Ct. takes the matter in its own hands.

is well settled that this is a limitation on the power of the Federal government, and not on the States. The Constitution of Wisconsin, however, has a provision almost identical in language, *viz.*, that "the property of no person shall be taken for public use without just compensation therefor."¹ Indeed this limitation on the exercise of the right of eminent domain is so essentially a part of American constitutional law that it is believed that no State is now without it, and the only question that we are to consider is whether the injury to plaintiff's property, as set forth in his declaration, is within its protection.

The declaration states that, by reason of the dam, the water of the lake was so raised as to cause it to overflow all his land, and that the overflow remained continuously from the completion of the dam, in the year 1861, to the commencement of the suit in the year 1867, and the nature of the injuries set out in the declaration are such as show that it worked an almost complete destruction of the value of the land.

The argument of the defendant is that there is no *taking* of the land within the meaning of the constitutional provision, and that the damage is a consequential result of such use of a navigable stream as the government had a right to for the improvement of its navigation.

It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors. . . .

[Here follows a statement of *Simmickson v. Johnson*, 2 Harrison, 129; and *Gardner v. Newburgh*, 2 Johns. Ch. 162 (*ante*, pp. 979 and 986, with quotations from them.)]

If these be correct statements of the limitations upon the exercise of the right of eminent domain, as the doctrine was understood before it had the benefit of constitutional sanction, by the construction now sought to be placed upon the Constitution it would become an instrument of oppression rather than protection to individual rights.

But there are numerous authorities to sustain the doctrine that a

¹ See *supra*, p. 956, note. — ED.

serious interruption to the common and necessary use of property may be, in the language of Mr. Angell, in his work on water-courses, equivalent to the taking of it, and that under the constitutional provisions it is not necessary that the land should be absolutely taken. Angell on Water-courses, § 465 *a*; *Hooker v. New Haven and Northampton Co.*, 14 Connecticut, 146; *Rowe v. Granite Bridge Co.*, 21 Pickering, 344; *Canal Appraisers v. The People*, 17 Wendell, 604; *Lackland v. North Missouri Railroad Co.*, 31 Missouri, 180; *Stevens v. Proprietors of Middlesex Canal*, 12 Massachusetts, 466. And perhaps no State court has given more frequent utterance to the doctrine that overflowing land by backing water on it from dams built below is within the constitutional provision than that of Wisconsin. In numerous cases of this kind under the Mill and Mill-dam Act of that State this question has arisen, and the right of the mill-owner to flow back the water has been repeatedly placed on the ground that it was a taking of private property for public use. It is true that the court has often expressed its doubt whether the use under that Act was a public one, within the meaning of the Constitution, but it has never been doubted in any of those cases that it was such a taking as required compensation under the Constitution. *Pratt v. Brown*, 3 Wisconsin, 613; *Walker v. Shepardson*, 4 Id. 511; *Fisher v. Horicon Iron Co.*, 10 Id. 353; *Newell v. Smith*, 15 Id. 104; *Goodall v. City of Milwaukee*, 5 Id. 39; *Weeks v. City of Milwaukee*, 10 Id. 242. As it is the Constitution of that State that we are called on to construe, these decisions of her Supreme Court, that overflowing land by means of a dam across a stream is taking private property, within the meaning of that instrument, are of special weight if not conclusive on us. And in several of these cases the dams were across navigable streams.

It is difficult to reconcile the case of *Alexander v. Milwaukee*, 16 Wisconsin, 248, with those just cited, and in its opinion the court seemed to feel the same difficulty. They assert that the weight of authority is in favor of leaving the party injured without remedy when the damage is inflicted for the public good, and is remote and consequential. There are some strong features of analogy between that case and this, but we are not prepared to say, in the face of what the Wisconsin Court had previously decided, that it would hold the case before us to come within the principle of that case. At all events, as the court rests its decision upon the general weight of authority and not upon anything special in the language of the Wisconsin bill of rights, we feel at liberty to hold as we do that the case made by the plaintiff's declaration is within the protection of the constitutional principle embodied in that instrument.

We are not unaware of the numerous cases in the State courts in which the doctrine has been successfully invoked that for a consequential injury to the property of the individual arising from the prosecution of improvements of roads, streets, rivers, and other highways, for the public good, there is no redress; and we do not deny that the principle

is a sound one, in its proper application, to many injuries to property so originating. And when, in the exercise of our duties here, we shall be called upon to construe other State constitutions, we shall not be unmindful of the weight due to the decisions of the courts of those States. But we are of opinion that the decisions referred to have gone to the uttermost limit of sound judicial construction in favor of this principle, and, in some cases, beyond it, and that it remains true that where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution, and that this proposition is not in conflict with the weight of judicial authority in this country, and certainly not with sound principle. Beyond this we do not go, and this case calls us to go no further.

We are, therefore, of opinion that the second plea set up no valid defence, and that the demurrer to it should have been sustained.

[A discussion of the fourth and sixth pleas is omitted, as not material to the subject in hand.]

Judgment reversed, and the case remanded to the Circuit Court for further proceedings not inconsistent with this opinion.¹

EATON v. THE BOSTON, CONCORD, AND MONTREAL RAILROAD.

SUPREME JUDICIAL COURT OF NEW HAMPSHIRE. 1872.

[51 N. H. 504.]

ACTIONS on the case, against the Boston, Concord, & Montreal Railroad, — one brought by Ezra B. Eaton, the other by Milo Aiken, to recover damages done during the freshet of October, 1869, to their respective farms in Wentworth, and alleged to have been occasioned by the construction of the defendants' railroad.

The defendants were duly incorporated by legislative authority, and constructed their road across the farms of the plaintiffs during the years 1849, 1850, and 1851, — the road having been previously surveyed and located. Damages were duly appraised and paid.

Eaton, on March 24, 1851, after the construction of the road, gave the defendants a warranty deed of that part of his farm on which the road is located, and on the same day executed the following release:

"I, the subscriber, do hereby acknowledge that I have received of the Boston, Concord, & Montreal Railroad the sum of two hundred and seventy-five dollars, in full for the amount of damages assessed to

¹ See *Mills et al. v. U. S.*, 46 Fed. Rep. 738. — Ed.

me by the railroad commissioners of the State of New Hampshire, in conjunction with the selectmen of Wentworth, on account of the laying out of the said Boston, Concord, & Montreal Railroad through and over my land; and I do hereby release and discharge the said corporation from said damages."

Aiken, on November 7, 1849, gave the defendants a warranty deed of that part of his farm on which the road is located. Said deed contains the following clause: "And in consideration aforesaid, I hereby release said corporation from all damages, direct or consequential, by reason of the constructing, maintaining, and using their railroad on and over the land hereby conveyed, and through my said land." This release, and that executed by Eaton, were printed, save names, amounts, &c., which were inserted in blanks left for that purpose.

Northerly of the plaintiffs' farms, which consist of meadow lands lying on Baker's River, there is a narrow ridge of land, some twenty-five feet or more in height, extending from the high lands on the east westerly to said river, completely protecting said meadows from the effect of floods and freshets in said river. Said ridge is about twenty rods wide upon the top, and a small part of it in width is included in the plaintiff Aiken's farm, — the northerly line of his said farm being near the southerly edge of the top of said ridge. The plaintiff Eaton's farm lies south of said Aiken's. Through this ridge the defendants, in constructing their road, made a deep cut, through which the waters of said river in floods and freshets sometimes flowed; and the damages sued for were occasioned by the waters flowing through said cut, and carrying sand and gravel and stones upon said Aiken's farm, and over and across it to and upon the farm of said Eaton. The plaintiffs claim that the defendants are liable for the damages so occasioned, although they may have constructed their road at said cut with due care and prudence. The defendants say that they are not so liable. The defendants claim that, under the circumstances of this case, the corporation are not liable for any damages accruing to the plaintiffs from a proper construction of their road, and that in constructing the same they were only bound to do it in the usual manner, and so as to make the owners of adjoining land reasonably safe, and with ordinary care and prudence, and that they were not bound to preclude the possibility of damage by reason of such construction.

The parties consented that the foregoing questions be determined by the court, and that afterwards either party may have a trial by jury if desired, without prejudice from anything herein contained.

Upon the foregoing facts appearing, and the parties having stated their positions and claims, the court, *pro forma*, ruled that the plaintiffs would be entitled to recover such damages as have been caused them in consequence of the defendants' cutting away the ridge north of the plaintiffs' farms, and thereby letting the river in times of freshet run through this cut and damage the plaintiffs' land; to which ruling the defendants excepted.

occasionally this is held to be an easement. Was there here taking of an easement here? Did the railroad have a right to flow the water on to his land? It is a question with the use of and

Carpenter and Flanders, for the plaintiffs. II. Bingham, Burrows, and Page, for the defendants.

SMITH, J. Eaton's case will be considered first.

It is virtually conceded that, if the cut through the ridge had been made by a private land-owner, who had acquired no rights from the plaintiff or from the legislature, he would be liable for the damages sought to be recovered in this action. It seems to be assumed that the freshets were such as, looking at the history of the stream in this respect, might be "reasonably expected occasionally to occur." The defendants removed the natural barrier which theretofore had completely protected the plaintiff's meadow from the effect of these freshets; and, for the damages caused to the plaintiff in consequence of such removal, the defendants are confessedly liable, unless their case can be distinguished from that of the private land-owner above supposed. Such a distinction is attempted upon two grounds,—first, that the plaintiff has already been compensated for this damage, it being alleged that the defendants have, by negotiation, or by compulsory proceedings, purchased of the plaintiff the right to inflict it; second, that the defendants are acting under legislative authority, by virtue of which they are entitled to inflict this damage on the plaintiff without any liability to compensate him therefor.

In support of the first ground, the defendants rely upon the plaintiff's release, and upon the appraisal of damages under the statute.

The release does not support the defendants' claim. The plaintiff released the defendants from damages on account of the laying out of the railroad through and over his land. The damages which the court ruled that the plaintiff would be entitled to recover were not occasioned by the laying out of the road over the plaintiff's land, but by the construction of the road over the land of other persons. See *Delaware & Raritan Canal Co. v. Lee*, 2 Zabriskie, 243. The ruling was, that the plaintiff could recover such damages as have been caused him in consequence of the defendants' cutting away the ridge north of the plaintiff's farm. . . .

The defendants' first position is, that the plaintiff has already received compensation for this damage. This position the court have now overruled. The defendants' next position is, that the plaintiff is not legally entitled to receive any compensation, but is bound to submit to the infliction of this damage without any right of redress. The argument is not put in the precise words we have just used, but that is what we understand them to mean. The defendants say that the legislative charter authorized them to build the road, if they did it in a prudent and careful manner; that they constructed the road at the cut with due care and prudence; and that they cannot be made liable as tort-feasors for doing what the legislature authorized them to do. This involves two propositions: first, that the legislature have attempted to authorize the defendants to inflict this injury upon the plaintiff without making compensation; and second, that the legislature have power to

This case has been very much praised especially

This case discusses a constitutional question, when there is no

M. B. confer such authority. { There are decisions which tend to show that the charter should not be construed as evincing any legislative intention to authorize this injury, or to shield the defendants from liability in a common-law action. *Tinsman v. Belvidere Delaware R. R. Co.*, 2 Dutcher N. J. 148; *Sinnickson v. Johnson*, 2 Harr. N. J. 129; *Hooker v. New Haven & Northampton Co.*, 14 Conn. 146; *Fletcher v. Auburn & Syracuse R. R. Co.*, 25 Wendell, 462; *Brown v. Cayuga & Susquehanna R. R. Co.*, 12 N. Y. (2 Kernan), 486, p. 491. See, also, *Eastman v. Company*, 44 N. H. 143, p. 160; *Hooksett v. Company*, 44 N. H. 105, p. 110; *Company v. Goodale*, 46 N. H. 53, p. 57; Barrows, J., in *Lee v. Pembroke Iron Co.*, 57 Maine, 481, p. 488. { But we propose to waive inquiry on this point, and to consider only the correctness of the second proposition, or, in other words, the question of legislative power. }

The defendants cannot claim protection under an implied power, where an express power would be invalid: the legislature cannot do indirectly what they cannot do directly. Unless an express provision in the charter, authorizing the infliction of this injury without making compensation, would be a valid exercise of legislative power, the defendants cannot successfully set up the plea that the injury was necessarily consequent upon the exercise of their chartered powers, and therefore impliedly authorized. The defence, then, really presents this question: Have the legislature power to authorize the railroad corporation to divert the waters of the river, by removing a natural barrier, so as to cause the waters "sometimes in floods and freshets" to flow over the plaintiff's land, "carrying sand, gravel, and stones" upon his farm, without making any provision for his compensation?

Although the Constitution of this State does not contain, in any one clause, an express provision requiring compensation to be made when private property is taken for public uses, yet it has been construed by the courts, in view of the spirit and tenor of the whole instrument, as prohibiting such taking without compensation; and it is understood to be the settled law of the State, that the legislature cannot constitutionally authorize such a taking without compensation. *Piscataqua Bridge v. N. H. Bridge*,¹ 7 N. H. 35, pp. 66, 70; Perley, C. J., in

¹ The language here referred to is as follows: "That franchise, as we have said, is property. 'No part of a man's property shall be taken from him or applied to public uses, without his own consent, or that of the representative body of the people.' N. H. Bill of Rights, Art. 12. This has always been understood necessarily to include, as a matter of right, and as one of the first principles of justice, the further limitation, that in case his property is taken without his consent, due compensation must be provided. 1 Black. Com. 139; 2 Johns. C. R. 166; *Gardner v. Village of Newburgh*, and authorities there cited. It is not supposed here that even the consent of the representative body of the people could give authority to take the property of individual citizens for highways, bridges, ferries, and other works of internal improvement, without the assent of the owner, and without any indemnity provided by law. Such a power would be essentially tyrannical, and in contravention of other articles in the Bill of Rights." — PARKER, J., for the court, in *Prop'rs of Piscataqua Bridge v. N. H. Bridge et al.*, ubi supra. — ED.

Petition of Mount Washington Road Co., 35 N. H. 134, pp. 141, 142; Sargent, J., in *Eastman v. Amoskeag Manuf. Co.*, 44 N. H. 143, p. 160; *State v. Franklin Falls Co.*, 49 N. H. 240, p. 251. The counsel for the defendants have not been understood to question the correctness of this interpretation of the Constitution.

The vital issue then is, whether the injuries complained of amount to a taking of the plaintiff's property, within the constitutional meaning of those terms. It might seem that to state such a question is to answer it; but an examination of the authorities reveals a decided conflict of opinion. The constitutional prohibition (which exists in most, or all, of the States) has received, in some quarters, a construction which renders it of comparatively little worth, being interpreted much as if it read: "No person shall be divested of the formal title to property without compensation, but he may without compensation be deprived of all that makes the title valuable." To constitute a "taking of property," it seems to have sometimes been held necessary that there should be "an exclusive appropriation," "a total assumption of possession," "a complete ouster," an absolute or total conversion of the entire property, "a taking of the property altogether." These views seem to us to be founded on a misconception of the meaning of the term "property," as used in the various State constitutions.

In a strict legal sense, land is not "property," but the subject of property. The term "property," although in common parlance frequently applied to a tract of land or a chattel, in its legal signification "means only the rights of the owner in relation to it." "It denotes a right . . . over a determinate thing." "Property is the right of any person to possess, use, enjoy, and dispose of a thing." Selden, J., in *Wynehamer v. The People*, 13 N. Y. 378, p. 433; 1 Blackstone Com. 138; 2 Austin on Jurisprudence, 3d ed., 817, 818. If property in land consists in certain essential rights, and a physical interference with the land substantially subverts one of those rights, such interference "takes," *pro tanto*, the owner's "property." The right of indefinite user (or of using indefinitely) is an essential quality or attribute of absolute property, without which absolute property can have no legal existence. "Use is the real side of property." This right of user necessarily includes the right and power of excluding others from using the land. See 2 Austin on Jurisprudence, 3d ed., 836; Wells, J., in *Walker v. O. C. W. R. R.*, 103 Mass. 10, p. 14. From the very nature of these rights of user and of exclusion, it is evident that they cannot be materially abridged without, *ipso facto*, taking the owner's "property." If the right of indefinite user is an essential element of absolute property or complete ownership, whatever physical interference annuls this right takes "property," although the owner may still have left to him valuable rights (in the article) of a more limited and circumscribed nature. He has not the same property that he formerly had. Then, he had an unlimited right; now, he has only a limited right. His absolute ownership has been reduced to a qualified owner-

ship. Restricting A's unlimited right of using one hundred acres of land to a limited right of using the same land, may work a far greater injury to A than to take from him the title in fee-simple to one acre, leaving him the unrestricted right of using the remaining ninety-nine acres. Nobody doubts that the latter transaction would constitute a "taking of property." Why not the former?

If, on the other hand, the land itself be regarded as "property," the practical result is the same. The purpose of this constitutional prohibition cannot be ignored in its interpretation. The framers of the Constitution intended to protect rights which are worth protecting; not mere empty titles, or barren insignia of ownership, which are of no substantial value. If the land, "in its corporeal substance and entity," is "property," still, all that makes this property of any value is the aggregation of rights or qualities which the law annexes as incidents to the ownership of it. The constitutional prohibition must have been intended to protect all the essential elements of ownership which make "property" valuable. Among these elements is, fundamentally, the right of user, including, of course, the corresponding right of excluding others from the use. See Comstock, J., in *Wynehamer v. The People*, 13 N. Y. 378, p. 396. A physical interference with the land, which substantially abridges this right, takes the owner's "property" to just so great an extent as he is thereby deprived of this right. "To deprive one of the use of his land is depriving him of his land;" for, as Lord Coke said: "What is the land but the profits thereof?" Sutherland, J., in *People v. Kerr*, 37 Barb. 357, p. 399; Co. Litt. 4 b. The private injury is thereby as completely effected as if the land itself were "physically taken away."

The principle must be the same whether the owner is wholly deprived of the use of his land, or only partially deprived of it; although the amount or value of the property taken in the two instances may widely differ. If the railroad corporation take a strip four rods wide out of a farm to build their track upon, they cannot escape paying for the strip by the plea that they have not taken the whole farm. So a partial, but substantial, restriction of the right of user may not annihilate all the owner's rights of property in the land, but it is none the less true that a part of his property is taken. Taking a part "is as much forbidden by the Constitution as taking the whole. The difference is only one of degree; the quantum of interest may vary, but the principle is the same." See 6 Am. Law Review, 197-198; Lawrence, J., in *Nerins v. City of Peoria*, 41 Illinois, 502, p. 511. The explicit language used in one clause of our Constitution indicates the spirit of the whole instrument. "No part of a man's property shall be taken. . . ." Constitution of N. H., Bill of Rights, article 12. The opposite construction would practically nullify the Constitution. If the public can take part of a man's property without compensation, they can, by successive takings of the different parts, soon acquire the whole. Or, if it is held that the complete divestiture of the last scintilla of interest is a taking

of the whole for which compensation must be made, it will be easy to leave the owner an interest in the land of infinitesimal value.

The injury complained of in this case is not a mere personal inconvenience or annoyance to the occupant. Two marked characteristics distinguish this injury from that described in many other cases. First, it is a physical injury to the land itself, a physical interference with the rights of property, an actual disturbance of the plaintiff's possession. Second, it would clearly be actionable if done by a private person without legislative authority. The damage is "consequential," in the sense of not following immediately in point of time upon the act of cutting through the ridge, but it is what Sir William Erle calls "consequential damage to the actionable degree." See *Brand v. H. & C. R. Co.*, Law Reports, 2 Queen's Bench, 223, p. 249. These occasional inundations may produce the same effect in preventing the plaintiff from making a beneficial use of the land as would be caused by a manual asportation of the constituent materials of the soil. Covering the land with water, or with stones, is a serious interruption of the plaintiff's right to use it in the ordinary manner. If it be said that the plaintiff still has his land, it may be answered, that the face of the land does not remain unchanged, and that the injury may result in taking away part of the soil ("and, if this may be done, the plaintiff's dwelling-house may soon follow"); and that, even if the soil remains, the plaintiff may, by these occasional submergings, be deprived of the profits which would otherwise grow out of his tenure. "His dominion over it, his power of choice as to the uses to which he will devote it, are materially limited." Brinkerhoff, J., in *Reeves v. Treasurer of Wood County*, 8 Ohio St. 333, p. 346.

The nature of the injury done to the plaintiff may also be seen by adverting to the nature of the right claimed by the defendants. The primary purpose of the defendants in cutting through the ridge was to construct their road at a lower level than would otherwise have been practicable. But, although the cut was not made "for the purpose of conducting the water in a given course" on to the plaintiff's land, it has that result; and the defendants persist in allowing this excavation to remain, notwithstanding the injury thereby visibly caused to the plaintiff. Rather than raise the grade of their track, they insist upon keeping open a canal to conduct the flood-waters of the river directly on to the plaintiff's land. If it be said that the water came naturally from the southerly end of the cut on to the plaintiff's land, the answer is, that the water did not come naturally to the southerly end of the cut. It came there by reason of the defendants' having made that cut. In consequence of the cut, water collected at the southerly boundary of the ridge, north of the plaintiff's farm, which would not have been there if the ridge had remained in its normal and unbroken condition. They have "so dealt with the soil" of the ridge, that, if a flood came, instead of being held in check by the ridge, and ultimately getting away by the proper river channel without harm to the plaintiff, it flowed

through where the ridge once was on to the plaintiff's land. "Could the defendants say they were not liable because they did not cause the rain to fall," which resulted in the freshet; or because the water "came there by the attraction of gravitation?" See Bramwell, Baron, in *Smith v. Fletcher*, Law Reports, 7 Exchq. 305, p. 310. If the ridge still remained in its natural condition, could the defendants pump up the flood-water into a spout on the top of the ridge, and thence, by means of the spout, pour it directly on to the plaintiff's land? If not, how can they maintain a canal through which the water by the force of gravitation will inevitably find its way to the plaintiff's land? See Ames, J., in *Shipley v. Fifty Associates*, 106 Mass. 194, pp. 199, 200; Chapman, C. J., in *Salisbury v. Herchenroder*, 106 Mass. 458, p. 460. To turn a stream of water on to the plaintiff's premises is as marked an infringement of his proprietary rights as it would be for the defendants to go upon the premises in person and "dig a ditch, or deposit upon them a mound of earth." See Lawrence, J., in *Nevins v. City of Peoria*, 41 Illinois, 502, p. 510; Dixon, C. J., in *Pettigrew v. Village of Evansville*, 25 Wisconsin, 223, pp. 231, 236. The defendants may, perhaps, regret that they cannot maintain their track at its present level without thereby occasionally pouring flood-water on to the land of the plaintiff. Indeed, the passage of this water through the cut may cause some injury to the defendants' road bed. But the advantages of maintaining the track at the present grade outweigh, in the defendants' estimation, the risk of injury by water to themselves and to the plaintiff. In asserting the right to maintain the present condition of things as to the cut, the defendants necessarily assert the right to produce all the results which naturally follow from the existence of the cut. In effect, they thus assert a right to discharge water on to the plaintiff's land. Such a right is an easement. A right of "occasional flooding" is just as much an easement as a right of "permanent submerging;" it belongs to the class of easements which "are by their nature intermittent—that is, usable or used only at times." See Goddard's Law of Easements, 125. If the defendants had erected a dam on their own land across the river below the plaintiff's meadow, and by means of flash-boards thereon had occasionally caused the water to flow back and overflow the plaintiff's meadow so long and under such circumstances as to give them a prescriptive right to continue such flowage, the right thus acquired would unquestionably be an "easement." The right acquired in that case does not differ in its nature from the right now claimed. In the former instance, the defendants flow the plaintiff's land by erecting an unnatural barrier below his premises. In the present instance, they flow his land by removing a natural barrier on the land above his premises. In both instances, they flow his land by making "a non-natural use" of their own land. In both instances, they do an act upon their own land, the effect of which is to restrict or burden the plaintiff's ownership of his land (see *Leconfield v. Lonsdale*, Law Reports, 5 Com. Pleas, 657, p. 696); and the weight of that burden

is not necessarily dependent upon the source of the water, whether from below or above. See Bell, J., in *Tillotson v. Smith*, 32 N. H. 90, pp. 95-96. In both instances they turn water upon the plaintiff's land "which does not flow naturally in that place." If the right acquired in the former instance is an easement, equally so must be the right claimed in the latter. If, then, the claim set up by the defendants in this case is well founded, an easement is already vested in them. An easement is property, and is within the protection of the constitutional prohibition now under consideration. If the defendants have acquired this easement, it cannot be taken from them, even for the public use, without compensation. But the right acquired by the defendants is subtracted from the plaintiff's ownership of the land. Whatever interest the defendants have acquired in this respect the plaintiff has lost. If what they have gained is property, then what he has lost is property. If the easement, when once acquired, cannot be taken from the defendants without compensation, can the defendants take it from the plaintiff in the first instance without compensation? See Brinkerhoff, J., *ubi sup.*; Selden, J., in *Williams v. N. Y. Central R. R.*, 16 N. Y. 97, p. 109. An easement is all that the railroad corporation acquire when they locate and construct their track directly over a man's land. The fee remains in the original owner. *Blake v. Rich*, 34 N. H. 282. Yet nobody doubts that such location and construction is a "taking of property," for which compensation must be made. See Redfield, J., in *Hatch v. Vt. Central R. R.*, 25 Vt. 49, p. 66. What difference does it make in principle whether the plaintiff's land is encumbered with stones, or with iron rails? whether the defendants run a locomotive over it, or flood it with the waters of Baker's River? See Wilcox, J., in *March v. P. & C. R. R.*, 19 N. H. 372, p. 380; Walworth, Chan., in *Canal Com'rs & Canal Appraisers v. The People*, 5 Wendell, 423, p. 452.

If it should be held that the legislature had conferred a valid authority upon the defendants to make this cut, if necessary to the construction of the railroad, or if made with care and skill, the question of necessity or of care would become material, and might have to be decided by a jury. See *Johnson v. Atlantic & St. L. R. Co.*, 35 N. H. 569; *Estabrooks v. P. & S. R. Co.*, 12 Cush. 224; *Mellen v. Western R. R.*, 4 Gray, 301; *Curtis v. Eastern R. R.*, 14 Allen, 55; same case, 98 Mass. 428. But in the view now taken, these questions are immaterial. The defendants are not held liable, as in some other cases, because their acts were unnecessary, or unskilful, and hence not within the contemplation of the charter. They are held liable, irrespective of any negligence on their part, on the ground that it was beyond the power of the legislature to authorize the infliction of this injury on the plaintiff, without making provision for his compensation.

We think that here has been a taking of the plaintiff's property; that, as the statutes under which the defendants acted make no provision for the plaintiff's compensation, they afford no justification; that the defendants are liable in this action as wrong-doers; and that the

ruling of the court was correct. These conclusions, which are supported by authorities to which reference will soon be made, seem to us so clear, that, if there were no adverse authorities, it would be unnecessary to prolong the discussion of this case. But, as there are respectable authorities which are in direct conflict with these conclusions, it has been thought desirable to examine some arguments which have, at various times, been advanced in support of the opposite view.

In some instances, as soon as it has been made to appear that there is a legislative enactment purporting to authorize the doing of the act complained of, the complaint has been at once summarily disposed of by the curt statement "that an act authorized by law cannot be a tort." This is begging the question. It assumes the constitutionality of the statute. If the enactment is opposed to the Constitution, it is "in fact no law at all." "The term unconstitutional law, in American jurisprudence, is a misnomer, and implies a contradiction." "The will of the legislature is only law when it is in harmony with, or at least is not opposed to, that controlling instrument which governs the legislative body equally with the private citizen." Cooley's Constitutional Limitations, 1st ed., pp. 3, 4. The error in question originates in a "fallacy of reference." It arises from following English authorities, without adverting to the immense difference between the practically omnipotent powers of the British Parliament and the comparatively limited powers of our State legislatures, acting under the restrictions of written constitutions. Parliament is the supreme power of the realm. It is at once a legislature and a constitutional convention. 1 De Tocqueville's Democracy in America, Reeves's Translation, 2d Am. ed., 80. Parliament can "do everything that is not naturally impossible;" and what it does "no authority on earth can undo." 1 Blackstone's Com. 161; 4 Coke's Inst. 36. A State legislature, on the other hand, "is powerless when it attempts to pass the limits prescribed by the Constitution." See Cooley's Const. Lim., 1st ed., 45, 46. In England, whenever it appears that the act complained of was authorized by a parliamentary statute, the court are perfectly justified in dismissing the complaint, on the ground that the act was "authorized by law." In this country, when it appears that the legislature have gone through the form of enacting a statute purporting to authorize the act complained of, the further inquiry remains, whether the legislature had the constitutional power to pass such a statute. If they had not, then their enactment is not "law," and can afford no justification. The error of blindly following English authorities, as to the justification afforded by statutory enactments, has repeatedly been exposed. Swan, J., in *Crawford v. The Village of Delaware*, 7 Ohio St. 459, pp. 466, 477; Maisou, Senator, in *Bloodgood v. Mohawk & Hudson Railroad Co.*, 18 Wendell, 9, pp. 29-31; Archer, C. J., in *Barron v. Mayor of Baltimore*, 2 Amer. Jurist, 210; Smith, J., in *Goodall v. City of Milwaukee*, 5 Wisconsin, 32, pp. 38, 45; Cooley's Const. Lim., 1st ed., 85; and see, also, Angell on Watercourses, 6th ed., sec. 461;

Sutherland, J., in *People v. Kerr*, 37 Barb. 357, pp. 412, 415; 1 Redf. on Railways, 4th ed., 232.

The error in the argument just commented upon, may, perhaps, be summed up in the statement, that it confounds the legislature with the constitutional convention. Closely allied to this is the error of confounding the legislature with the Supreme Court. It seems to have been contended that the legislature is competent to determine whether a franchise will be injurious to other interests, and that it is to be presumed, after a legislative grant, "that there is no just claim for resulting damages which has not been provided for." See *American Law Magazine*, vol. 1, No. 1, April, 1843, 58-60. This assumes both the omniscience and omnipotence of the legislature. If the legislators themselves are to finally decide whether they have transcended their constitutional powers, "then," in the words of Daniel Webster, "the Constitution ceases to be a legal and becomes only a moral restraint upon the legislature." It "is admonitory or advisory only, not legally binding. . . ." Speech on the Independence of the Judiciary, quoted in Cooley's *Const. Lim.*, 1st ed. 46, note 1. It is now universally conceded to be the province and duty of the judiciary to pass upon the constitutionality of statutes; but it is to be regretted that some courts have manifested excessive reluctance to pronounce statutes unconstitutional. "Whatever respect may be due to the legislature, that due to the Constitution is still greater." Lawrence, J., in *Burn v. The People*, 45 Illinois, 397, p. 419. The result has sometimes been "to sacrifice the individual to the community." See Sedgwick on Damages, 5th ed., 121, 122. "It is not," said Mr. Sedgwick, "an agreeable observation to make, but I believe it cannot be denied, that the protection afforded by the English government to property is much more complete in this respect than under our system, although Parliament claims to be despotically supreme, and although we boast our submission to constitutional restrictions. . . ." Sedgwick on Stat. and Const. Law, 523, 524, note. Parliamentary Acts, at the present time, usually contain carefully drawn clauses, scrupulously providing for the indemnity of those who are liable to be injured by the exercise of the powers granted by the Act. In this country it too often happens that the legislature neglect to carefully perform this duty, and the failure of the courts to pronounce the Act unconstitutional leaves the injured party without remedy. In view of the "form that the constitutional provision has assumed," in the hands of some courts, "it must," said the same author, "be admitted that in practice our constitutional guarantees are very flexible things. . . ." Sedgwick on Stat. and Const. Law, 534.

It is said that "if the legislature is competent to furnish the remedy, there is no denial of justice, though no action can be sustained at law." 1 *Amer. Law Magazine*, April, 1843, 57. Leave to apply to a future legislature for an act of indemnity is not the "certain remedy" to which (by Article 14 of the Bill of Rights) every subject is entitled "for all injuries he may receive . . . in his property." Besides, "is

the obligation to make him compensation any stronger upon a future legislature than it was on that one by whose authority his property has been taken ;" and if they have "failed to make a constitutional provision for his compensation," "what assurance can he have" that any future legislature will do so? "It was, however, to place the rights of property upon higher grounds than the mere legislative sense of justice and equity, that this prohibition upon legislative power was embodied in the bill of rights." Moore, J., in *Buffalo B. B. & C. R. R. Co. v. Ferris*, 26 Texas, 588, p. 602. . . .

It is familiar law that "where an agent exceeds his authority, what he does within it is valid, if that part be distinctly severable from the remainder." 1 Parsons on Contracts, 4th ed., 58. The same principle applies to the exercise by the legislature of the power delegated to them by the Constitution. No sound argument can be founded upon the hardship to the grantees of not receiving all that the legislature undertook to convey to them. Conceding that the grantees, by assuming the performance of the duties required of them by the charter, have paid a full consideration for all the privileges which the charter purported to convey to them, how does their case differ from that of other unfortunate persons who have purchased property of an irresponsible party who had no right to sell? Is the fact that the purchaser paid a full consideration to the wrongful vendor allowed to divest the title of the true owner? Yet, upon what other theory can it be said (1 Amer. Law Magazine, 75) that "we cannot look beyond the charter itself to determine the duties and liabilities of the grantee"?

It is said that a land-owner is not entitled to compensation where the damage is merely "consequential." The use of this term "consequential damage" "prolongs the dispute," and "introduces an equivocation which is fatal to any hope of a clear settlement." It means both damage which is so remote as not to be actionable, and damage which is actionable. Sometimes it is used to denote damage which, though actionable, does not follow immediately, in point of time, upon the doing of the act complained of; what Erle, C. J., aptly terms "consequential damage to the actionable degree." *Brand v. H. & C. R. Co.*, Law Reports, 2 Queen's Bench, 223, p. 249. It is thus used to signify damage which is recoverable at common law in an action of case, as contradistinguished from an action of trespass. On the other hand, it is used to denote a damage which is so remote a consequence of an act that the law affords no remedy to recover it. The terms "remote damages" and "consequential damages" "are not necessarily synonymous, or to be indifferently used. All remote damages are consequential, but all consequential damages are by no means remote." Sedgwick on Damages, 5th ed., 56. When, then, it is said that a land-owner is not entitled to compensation for "consequential damage," it is impossible either to affirm or deny the correctness of the statement until we know in what sense the phrase "consequential damage" is used. If it is to be taken to mean damage which would

not have been actionable at common law if done by a private individual, the proposition is correct. The constitutional restriction was designed "not to give new rights, but to protect those already existing." Pierce on Am. R. R. Law, 173; and see *Rickett v. Directors, &c., of Metropolitan Railway Co.*, Law Reports, 2 House of Lords, 175, pp. 188, 189, 196. But this does not concern the present case, where it is virtually conceded that the injury would have been actionable if done by a private individual not acting under statutory authority. If, upon the other hand, the phrase is used to describe damage, which, though not following immediately in point of time upon the doing of the act complained of, is nevertheless actionable, there seems no good reason for establishing an arbitrary rule that such damage can in no event amount to a "taking of property."

The severity of the injury ultimately resulting from an act is not always in inverse proportion to the lapse of time between the doing of the act and the production of the result. Heavy damages are recovered in case as well as in trespass. The question whether the injury constitutes a "taking of property" must depend on its effect upon proprietary rights, not on the length of time necessary to produce that effect. If a man's entire farm is permanently submerged, is the damage to him any less because the submerging was only the "consequential" result of another's act? It has been said "that a nuisance by flooding a man's land was originally considered so far a species of ouster, that he might have had a remedy for it by assize of novel disseisin;" but if it be conceded that at present the only common law remedy is by an action on the case, that does not change the aspect of the constitutional question. The form of action in which the remedy must be sought cannot be decisive of the question whether the injury falls within the constitutional prohibition. "We are not to suppose that the framers of the Constitution meant to entangle their meaning in the mazes" of the refined technical distinctions by which the common-law system of forms of action is "perplexed and encumbered." Such a test would be inapplicable in a large proportion of the States, where the distinction between trespass and case has been annihilated by the abolition of the old forms of action. We are not alone in the opinion that the phrase "consequential damage" has been misapplied in some of the discussions on this constitutional question; — see the criticisms of Miller, J., in *Pumpelly v. Green Bay Company*, 13 Wallace U. S. 166, p. 180; Paine, J., in *Alexander v. City of Milwaukee*, 16 Wisconsin, 247, p. 258; Sutherland, J., in *People v. Kerr*, 37 Barb. 357, pp. 403, 408; — and we think that the confusion thus engendered will account for some erroneous decisions. If this most ambiguous expression is to be used at all in this connection, the meaning attached to it should always be clearly defined, as is done in Pierce on Am. Railroad Law, 173.

It may perhaps be urged that a decision in favor of the plaintiff will give rise to a multiplicity of suits by other claimants, many of whom

have sustained no substantial damage. But this affords no ground for denying redress to this plaintiff, who has clearly sustained a substantial injury. Nor will the present decision be a precedent in future cases differing in their nature from the one before us. The answers given by other courts to similar objections are quite decisive. *Ld. Denman, C. J., in Regina v. Eastern Counties Railway Co.*, 2 Queen's Bench, 347, pp. 362, 363; *Montague Smith, J., in Brand v. H. & C. Railway Co.*, Law Reports, 2 Queen's Bench, 223, p. 245; *Parker, C. J., in Boston & Roxbury Mill Corp. v. Gardner*, 2 Pick. 33, pp. 38, 39. . . . [Here follows, at considerable length, a learned classification and consideration of the cases, ending with those designated as "the highway grade cases." The opinion closes as follows:]

By the foregoing review of authorities, it appears that the number of actual decisions in irreconcilable conflict with the present opinion is much smaller than has sometimes been supposed, and that, in a large proportion of the cases cited, the application of the principles here maintained would not have necessitated the rendition of a different judgment from that which the courts actually rendered in those cases.

Thus far Eaton's case alone has been under consideration. The only difference between Eaton's case and Aiken's case arises from the fact that a small part of the ridge is included in Aiken's farm, while none of it is on the farm of Eaton. This difference does not affect the present inquiry, which relates solely to the correctness of the ruling at the trial. The court did not rule that Aiken could recover the damages occasioned to him by the entire cut through the ridge. The ruling was carefully limited to "such damages as have been caused" the plaintiffs "in consequence of the defendants' cutting away the ridge north of the plaintiffs' farms." If any damage was caused to Aiken by the defendants' removing any portion of that "small part" of the ridge which was included in his farm, he is not entitled to recover for it under this ruling. So far, then, as the correctness of the ruling is concerned, Aiken's case stands on the same legal principle as Eaton's. Under this ruling it will be for a jury to say how much of the injury to Aiken's meadow was occasioned by the removal of that part of the ridge which was north of Aiken's farm.

In both cases the exception is overruled. As the defendants elect trial by jury, the order must be, *Case discharged.*¹

¹ Of this strong and closely reasoned judgment, it has been said that, "The leading case upon the subject, and the one which has contributed more than any other toward bringing about the change referred to in the last section is *Eaton v. B. C. & M. R. R. Co.*, 51 N. H. 504." *Lewis, Em. Domain*, s. 58 (Chicago, 1888). The change here referred to is one thought by Mr. Lewis to have taken place "within the last twenty years," the nature of which is sufficiently indicated in the opinion.

"That the flowing of lands against the owner's consent, and without compensation, is a taking of his property in violation of that provision of our Constitution, and that of most or all the American States, which prohibits the taking of property without compensation, is a proposition which seems to me so self-evident as hardly to admit of illustration by any example which can be made clearer; and which therefore can hardly

need the support of authorities. But see *Hooker v. New Haven and Northampton Co.*, 14 Conn. 146; *Rose v. Granite Bridge Corp.*, 21 Pick. 344; *Nevins v. City of Peoria*, 41 Ill. 502, 510; *Pettigrew v. Village of Evansville*, 25 Wis. 223, 231, 236; *Pumpelly v. Green Bay Co.*, 13 Wallace, 166. But the most satisfactory and best considered case which can be found in the books upon this subject, which examines, classifies, and analyzes nearly all the cases, and in the conclusions of which I wholly agree, is that of *Eaton v. B. C. & M. R. R. Co.*, 51 N. H. 504-535." — *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 321 (1874), Christiancy, J., for the court.

See the elaborate affirmation of this case in *Thompson v. Androscoggin Riv. Imp. Co.*, 54 N. H. 545 (1874). Compare *Weaver v. Miss. & Rum River Boom Co.*, 28 Minn. 534, 538 (1881); *Jonesville v. Carpenter*, 77 Wis. 288 (1890); *Anderson v. Henderson*, 124 Ill. 164; *Randolph, Em. Dom. s. 429*; *Atty.-Gen. v. Tomline*, 14 Ch. Div. 58 (1880); *Head v. Amosk. Co.*, *supra*, pp. 767-768; *Turner v. Nye*, *supra*, p. 893; *Wilhams v. Nelson*, 23 Pick. 141; see also Strong, J., for the court, in *Transport. Co. v. Chicago*, *infra*, p. 1082; and Earl, J., dissenting, in *Story v. El. Ry. Co.*, *infra*, p. 1105.

It will be observed that the judgment in the principal case may rest upon other grounds than those on which the court puts it.

The question of whether property has been taken under the power of eminent domain is, indeed, a question of substance; it is not a mere matter of names, or of the alleged or nominal ground on which the legislature assumes to act. It seems that it should make no difference under what head of legislative power it is sought to justify an act, *e. g.*, under the so-called police power or taxation, — if there be, in reality, and upon a large and just consideration of the matter, a taking, divesting, or destruction of property by the State for public purposes, compensation must be made. Such a doctrine, however, is to be applied with a recognition of well-known exceptions and qualifications, in full view of that historical conception of the meaning of a taking of property for public purposes, as contrasted with the usual operations of public authority, not thought of as requiring compensation, which may be gathered from the established practices of all civilized governments, and particularly of our own ancestors, and which is illustrated in such a case as *Com. v. Alger*, 7 Cush. 53 (*supra*, p. 693), or *Com. v. Tewksbury*, 11 Met. 55. See *supra*, p. 699 and note. Compare also *Mugler v. Kansas*, 123 U. S. 623 (*supra*, p. 782); and *Miller v. Horton*, 152 Mass. 540. A comparison, in the last case, of the dissenting opinion with that of the court will illustrate the true nature of the inquiry in such cases and the difficulties of the subject. In reasoning on such questions there is danger in assuming that the framers of our constitutions used language in the definite and exact sense reached by modern analysis. It is moreover never to be forgotten that much in our constitutions is addressed to legislatures and not at all to courts; that much injustice, in the way among other ways, of not making compensation where it should be given, for injuries suffered from acts of the executive and the legislature is beyond the reach of courts. See *supra*, pp. 151-154.

Compare what is said in "Origin and Scope of the American Doctrine of Constitutional Law" (Little and Brown, 1893), 26 *et seq.*, in discussing the meaning of the rule that laws are not to be set aside as unconstitutional unless they are so beyond a reasonable doubt: "In such a work there can be no permanent or fitting *modus vivendi* between the different departments unless each is sure of the full co-operation of the others, so long as its own action conforms to any reasonable and fairly permissible view of its constitutional power. The ultimate arbiter of what is rational and permissible is indeed always the courts, so far as litigated cases bring the question before them. This leaves to our courts a great and stately jurisdiction. It will only imperil the whole of it if it is sought to give them more. They must not step into the shoes of the law-maker, or be unmindful of the hint that is found in the sagacious remark of an English bishop nearly two centuries ago, quoted lately from Mr Justice Holmes: — 'Whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the law-giver, to all intents and purposes, and not the person who first wrote or spoke them.' . . . If what I have said be sound, it is greatly to be desired that it should be more emphasized by our courts, in its full significance. It has been

KOCH v. DELAWARE, &c. RAILROAD COMPANY.

SUPREME COURT OF NEW JERSEY. 1891.

[53 *N. J. Law*, 256.]

ON demurrer to declaration. Argued at November Term, 1890, before BEASLEY, CHIEF JUSTICE, and JUSTICES DIXON and MAGIE.

For the plaintiff, *McDermitt* and *Maher*. For the demurrants, *Bedle*, *Muirheid*, and *McGee*.

The opinion of the court was delivered by

BEASLEY, CHIEF JUSTICE. The declaration complains of damages arising from the flooding of her lands by an act of the defendant alleged to be illegal.

The lands so injured are described as adjoining a certain stream of water called Ned's Creek, which empties into a contiguous creek, known as Kingsland's Creek, and that the premises in question were drained and kept dry, until the grievance complained of, by means of a sluice at the mouth of the last-named stream.

These allegations do not appear to have any relation to the case, except to show, with unnecessary particularity, that antecedently to the tort complained of, the plaintiffs' premises had not been subject to any watery influx. No complaint is made of any interference with the sluice or creeks thus in a measure described.

The declaration then proceeds to the *gravamen* of the supposed cause of action. Briefly it is thus stated: That by a certain Act of the Legislature, the same being a supplement to "An Act to incorporate the Kingsland and Saw Mill Company," a certain tract of land is described, the northerly side of which abuts upon the line of the Boonton branch

often remarked that private rights are more respected by the legislatures of some countries which have no written constitution than by ours. No doubt our doctrine of constitutional law has had a tendency to drive out questions of justice and right, and to fill the mind of legislators with thoughts of mere legality, of what the Constitution allows. And moreover, even in the matter of legality, they have felt little responsibility; if we are wrong, they say, the courts will correct it. Meantime they and the people whom they represent, not being thrown back on themselves, on the responsible exercise of their own prudence, moral sense, and honor, lose much of what is best in the political experience of any nation; and they are belittled as well as demoralized. If what I have been saying is true, the safe and permanent road towards reform is that of impressing upon our people a far stronger sense than they have of the great range of possible mischief that our system leaves open, and must leave open to the legislatures, and of the clear limits of judicial power, so that responsibility may be brought sharply home where it belongs. The checking and cutting down of legislative power by numerous detailed prohibitions in the Constitution, cannot be accomplished without making the government petty and incompetent. This process has already been carried much too far in some of our States. Under no system can the power of courts go far to save a people from ruin; our chief protection lies elsewhere. If this be true, it is of the greatest public importance to put the matter in its true light." — Ed.

of the Morris and Essex Railroad Company, and that the plaintiffs' premises are a part of the tract so set forth. Then follows an averment that by another provision of the statute referred to it is enacted, "that it shall not be lawful to make any opening through the causeway or roadbed of the Boonton branch of the Morris and Essex Railroad Company, whereby any overflow or tide-water from the meadows lying beyond the same shall be discharged upon" the tract of land just mentioned.

The tort laid to the defendant is, that it "unlawfully made an opening through the causeway or roadbed of the Boonton branch, and thereby caused the plaintiffs' lands to be overflowed by the tide-water."

These statements can have but a single meaning. They denote that the plaintiffs' lands are protected from the incoming of tide-water by the artificial structure described as the causeway of the railroad, and the wrong done is, that the defendant has, in part, removed that dam.

It is, consequently, plain, that the plaintiffs, in order to show a suable wrong, must make it evident that they have a legal right to insist on the maintenance of the railroad structure in question. It is not sufficient for them to show that they will sustain a detriment by its removal; the ground of their action is, and must be, a deprivation of a right that the law secures to them; and, therefore, if they cannot require the keeping up of this embankment, they cannot complain, in a court of law, of its destruction or its impairment, whether such act be done by its owner or by a stranger as an act of trespass.

And this seems to be the theory upon which the present pleading has been composed. The plaintiffs' legal right to the unimpaired existence of this defensive roadway, so beneficial to their property, is described in the declaration as emanating from the legislative prohibition against any persons making an opening in it. As the language of the Act is plain to that effect, there can be no doubt of the validity of this reliance of the plaintiffs, if the Act itself be sustainable.

And this seems to me to be the flaw in the plaintiffs' case; the statute appears to be destitute of all semblance of legality. It is a private Act, and it is not shown that it has even been accepted by the corporate body for whose benefit it was designed. It arbitrarily forbids the Boonton branch railroad to make use of its roadway in a particular manner—that is, to remove it at its pleasure, in whole or in part. This is not within the competency of legislation. It is not perceived how the law-maker can direct this corporate body to forever refrain from removing a roadbed constructed by it on its own property. The legislature, by its edict, cannot burden the land of the railroad for the benefit of other property.

Inasmuch, therefore, as this statute cannot be sustained, the plaintiffs' supposed cause of action has no basis.

The defendant is entitled to judgment on the demurrer.

IN *Transportation Co. v. Chicago*, 99 U. S. 635 (1878), on error to the Circuit Court of the United States for the Northern District of Illinois, STRONG, J., for the court said: "We are of opinion that no error has been shown in this record, though the assignments are very numerous. The action was case to recover damages for injuries alleged to have been sustained by the plaintiffs in consequence of the action of the city authorities in constructing a tunnel or passageway along the line of La Salle Street and under the Chicago River, where it crosses that street. The plaintiffs were the lessees of a lot bounded on the east by the street, and on the south by the river, and the principal injury of which they complain is, that by the operations of the city they were deprived of access to their premises, both on the side of the river and on that of the street, during the prosecution of the work. It is not claimed that the obstruction was a permanent one, or that it was continued during a longer time than was necessary to complete the improvement. Nor is it contended that there was unreasonable delay in pushing the work to completion, or that the coffer-dam constructed in the river, extending some twenty-five or thirty feet in front of the plaintiff's lot, was not necessary, indeed indispensable, for the construction of the tunnel.

"The case has been argued on the assumption that the erection of the coffer-dam, and the necessary excavations in the street, constituted a public nuisance, causing special damage to the plaintiffs, beyond those incident to the public at large, and hence, it is inferred, the city is responsible to them for the injurious consequences resulting therefrom. The answer to this is that the assumption is unwarranted. That cannot be a nuisance, such as to give a common-law right of action, which the law authorizes. We refer to an action at common law such as this is. A legislature may and often does authorize and even direct acts to be done which are harmful to individuals, and which without the authority would be nuisances; but in such a case, if the statute be such as the legislature has power to pass, the acts are lawful, and are not nuisances, unless the power has been exceeded. In such grants of power a right to compensation for consequential injuries caused by the authorized erections may be given to those who suffer, but then the right is a creature of the statute. It has no existence without it. If this were not so, the suffering party would be entitled to repeated actions until an abatement of the erections would be enforced, or perhaps he might restrain them by injunction. . . .

"It is immaterial whether the fee of the street was in the State or in the city or in the adjoining lot-holders. If in the latter, the State had an easement to repair and improve the street over its entire length and breadth, to adapt it to easy and safe passage.

"It is undeniable that in making the improvement of which the plaintiffs complain the city was the agent of the State, and performing a public duty imposed upon it by the legislature; and that persons appointed or authorized by law to make or improve a highway are not answerable for consequential damages, if they act within their jurisdic-

not a public nuisance because authorized by law.
The state holds the highway in trust for the public, and
acts done in the proper exercise of governmental power

tion and with care and skill, is a doctrine almost universally accepted alike in England and in this country. It was asserted unqualifiedly in *The Governor and Company of the British Cast-Plate Manufacturers v. Meredith*, 4 Durnf. & E. 794; in *Sutton v. Clarke*, 6 Taun. 28; and in *Boulton v. Crowthor*, 2 Barn. & Cres. 703. It was asserted in *Green v. The Borough of Reading*, 9 Watts (Pa.), 382; *O'Connor v. Pittsburgh*, 18 Pa. St. 187; in *Callender v. Marsh*, 1 Pick. (Mass.) 418; as well as by the courts of numerous other States. It was asserted in *Smith v. The Corporation of Washington* (20 How. 135), in this court; and it has been held by the Supreme Court of Illinois. The decisions in Ohio, so far as we know, are the solitary exceptions. The doctrine, however it may at times appear to be at variance with natural justice, rests upon the soundest legal reason. The State holds its highways in trust for the public. Improvements made by its direction or by its authority are its acts, and the ultimate responsibility, of course, should rest upon it. But it is the prerogative of the State to be exempt from coercion by suit, except by its own consent. This prerogative would amount to nothing if it does not protect the agents for improving highways which the State is compelled to employ. The remedy, therefore, for a consequential injury resulting from the State's action through its agents, if there be any, must be that, and that only, which the legislature shall give. It does not exist at common law. The decisions to which we have referred were made in view of Magna Charta and the restriction to be found in the constitution of every State, that private property shall not be taken for public use without just compensation being made. But acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the State or its agents, or give him any right of action. This is supported by an immense weight of authority. Those who are curious to see the decisions will find them collected in Cooley on Constitutional Limitations, page 542 and notes. The extremest qualification of the doctrine is to be found, perhaps, in *Pumpelly v. Green Bay Company*, 13 Wall. 166, and in *Eaton v. Boston, Concord, & Montreal Railroad Co.*, 51 N. H. 504. In those cases it was held that permanent flooding of private property may be regarded as a "taking." In those cases there was a physical invasion of the real estate of the private owner, and a practical ouster of his possession. But in the present case there was no such invasion. No entry was made upon the plaintiffs' lot. All that was done was to render for a time its use more inconvenient.

"The present Constitution of Illinois took effect on the 8th of August, 1870, after the work of constructing the tunnel had been substantially completed. It ordains that private property shall not be 'taken or damaged' for public use without just compensation. This is an exten-

sion of the common provision for the protection of private property. But it has no application to this case, as was decided by the Supreme Court of the State in *Chicago v. Rumsey*, recently decided, and reported in *Chicago Legal News*, vol. x. p. 333, 87 Ill. 348. That case also decides that the city is not liable for consequential damages resulting from an improvement made in the street, the fee of which is in the city, provided the improvement had the sanction of the legislature. It also decides that La Salle Street is such a street, and declares that a recovery of such damages by an adjacent lot-holder has been denied by the settled law of the State up to the adoption of the present Constitution. There would appear, therefore, to be little left in this case for controversy."¹

CHICAGO v. TAYLOR.

SUPREME COURT OF THE UNITED STATES. 1887.

[125 U. S. 161.]

TRESPASS ON THE CASE. Judgment for plaintiffs. Defendant sued out this writ of error [to the Circuit Court of the United States for the Northern District of Illinois.] The case is stated in the opinion of the court.

Mr. Frederick S. Winston and Mr. John W. Green, for plaintiff in error. Mr. George A. Follunsbee and Mr. Thomas M. Hoynes, for defendants in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

This action was brought by Moses Taylor, as owner of an undivided interest in a lot in Chicago, having sixty feet front on Lumber Street, one hundred and fifty feet on Eighteenth Street, and three hundred feet on the South Branch of Chicago River, to recover the damages sustained by reason of the construction, by that city, of a viaduct on Eighteenth Street, in the immediate vicinity of said lot. The city did this work under the power conferred by its charter "to lay out, establish, open, alter, widen, extend, grade, pave, or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks, and public grounds, and vacate the same," and "to construct and keep in repair bridges, viaducts, and tunnels, and to regulate the use thereof." It appears that the construction of the viaduct was directed by special ordinances of the city council.

For many years prior to, as well as at, the time this viaduct was built, the lot in question was used as a coal-yard, having upon it sheds, machinery, engines, boilers, tracks, and other contrivances required in the business of buying, storing, and selling coal. The premises were long so used, and they were peculiarly well adapted for such business. There was evidence before the jury tending to show that, by reason of

¹ See *City Council v. Maddox*, 89 Ala. 181 (1890). — Ed.

Action of case to
recovery damages
sustained by
reason
of the con-
struction
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of Chicago
of a viaduct in
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"damages"

Access to the lot was
obstructed and the value of the lot was
diminished by the construction of the viaduct and

the construction of the viaduct, the actual market value of the lot, for the purposes for which it was specially adapted, or for any other purpose for which it was likely to be used, was materially diminished, access to it from Eighteenth Street being greatly obstructed, and at some points practically cut off; and that, as a necessary result of this work, the use of Lumber Street, as a way of approach to the coal-yard by its occupants and buyers, and as a way of exit for teams carrying coal from the yard to customers, was seriously impaired. There was also evidence tending to show that one of the results of the construction of the viaduct, and the approaches on either side of it to the bridge over Chicago River, was, that the coal-yard was often flooded with water running on to it from said approaches, whereby the use of the premises as a place for handling and storing coal was greatly interfered with, and often became wholly impracticable.

On behalf of the city there was evidence tending to show that the plaintiff did not sustain any real damage, and that the inconveniences to occupants of the premises, resulting from the construction and maintenance of the viaduct, were common to all other persons in the vicinity, and could not be the basis of an individual claim for damages against the city.

There was a verdict and judgment against the city. The court below having refused to set aside the judgment and grant a new trial, the case has been brought here for review in respect to errors of law which, it is contended, were committed in the admission of incompetent evidence, in the refusal of instructions asked by the city, and in the charge of the court to the jury.

Before noticing the assignments of error it will be well to ascertain what principles have been announced by this court or by the Supreme Court of Illinois in respect to the liability of municipal or other corporations in that State, for damages resulting to owners of private property from the alteration or improvement, under legislative authority, of streets and other public highways.

By the Constitution of Illinois, adopted in 1848, it was provided that no man's property shall "be taken or applied to public use without just compensation being made to him." Art. XIII. § 11. While this Constitution was in force Chicago commenced, and substantially completed, a tunnel under Chicago River, along the line of La Salle Street, in that city. It was sued for damages by the Northern Transportation Company, owning a line of steamers running between Ogdensburg, New York, and Chicago, and also a lot in the latter city, with dock and wharfage privileges, the principal injury of which it complained being that, during the prosecution of the work by the city, it was deprived of access to its premises, both on the side of the river and on that of the street. This court — in *Transportation Co. v. Chicago*, 99 U. S. 635, 641 — held that in making the improvement of which the plaintiff complained the city was the agent of the State, performing a public duty imposed by the legislature; and that "persons appointed or authorized by law to

make or improve a highway are not answerable for consequential damages, if they act within their jurisdiction, and with care and skill, is a doctrine almost universally accepted, alike in England and in this country," — citing numerous cases, among others *Smith v. Corporation of Washington*, 20 How. 135. "The decisions to which we have referred," the court continued, "were made in view of Magna Charta, and the restriction to be found in the Constitution of every State, that private property shall not be taken for public use without just compensation being made. But acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the State or its agents, or give him any right of action." This view, the court further said, was not in conflict with the doctrine announced in *Pumpelly v. Green Bay Co.*, 13 Wall. 166, which was a case of the permanent flooding of private property, a physical invasion of the real estate of the private owner, a practical ouster of his possession.

In *City of Chicago v. Rumsey*, 87 Illinois, 348, 363, the Supreme Court of Illinois, upon a full review of previous decisions, and especially referring to *Moses v. Pittsburg*, *Fort Wayne*, & *Chicago R. R. Co.*, 21 Illinois, 516; *Roberts v. Chicago*, 26 Illinois, 249; *Murphy v. Chicago*, 29 Illinois, 279; *Stone v. Fairbury*, *Pontiac*, and *North-western Railroad Co.*, 68 Illinois, 394; *Stetson v. The Chicago and Evanston Railroad Co.*, 75 Illinois, 74; and *Chicago, Burlington, and Quincy Railroad Co. v. McGinnis*, 79 Illinois, 269, held it to have been the settled law of that State, up to the time of the adoption of the Constitution of 1870, that there could be "no recovery by an adjacent property-holder, on streets the fee whereof is in the city, for the merely consequential damages resulting from the character of the improvements made in the streets, provided such improvement has the sanction of the legislature."

But the present case arose under, and must be determined with reference to, the Constitution of Illinois adopted in 1870, in which the prohibition against the appropriation of private property for public use, without compensation, is declared in different words from those employed in the Constitution of 1848. The provision in the existing Constitution is, that "private property shall not be taken or damaged for public use without just compensation." An important inquiry in the present case is to the meaning of the word "damaged" in this clause.

The earliest case in Illinois in which this question was first directly made and considered, is *Rigney v. City of Chicago*, 102 Illinois, 64, 74, 80. That was an action to recover damages sustained by the plaintiff by reason of the construction by Chicago of a viaduct or bridge along Halstead Street and across Kinzie Street, in that city, some 220 feet west of his premises, fronting on the latter street. There was no claim

that the plaintiff's possession was disturbed, or that any direct physical injury was done to his premises by the structure in question. But the complaint was, that his communication with Halstead Street, by way of Kinzie Street, had been cut off, whereby he was deprived of a public right enjoyed by him in connection with his premises, and an injury inflicted upon him in excess of that sustained by the public. For that special injury, in excess of the injury done to others, he brought suit. The trial court peremptorily instructed the jury to find for the city, holding, in effect, that the fee of the streets being in the city, there could be no recovery for the obstruction of which the plaintiff complained.

That judgment was reversed, an elaborate opinion being delivered, reviewing the principal cases under the Constitution of 1848, and referring to the adjudications in the courts of other States upon the general question as to what amounts to a taking of private property for public use within the meaning of such a provision as that contained in the former Constitution of Illinois. After alluding to the decisions of other State Courts to the effect that such a provision extended only to an actual appropriation of property by the State, and did not embrace consequential injuries, although what was done resulted, substantially, in depriving the owner of its use, the Supreme Court of Illinois reviewed numerous cases determined by it under the Constitution of 1848. *Nerins v. City of Peoria*, 41 Illinois, 502, decided in 1866; *Gillam v. Madison County Railroad*, 49 Illinois, 484; *City of Aurora v. Gillett*, 56 Illinois, 132; *Aurora v. Reed*, 57 Illinois, 29; *City of Jacksonville v. Lambert*, 62 Illinois, 519; *Toledo, Wabash, &c. Railroad v. Morrison*, 71 Illinois, 616. It says: "Whatever, therefore, may be the rule in other States, it clearly appears from this review of the cases that previous to, and at the time of the adoption of the present Constitution, it was the settled doctrine of this court that any actual physical injury to private property by reason of the erection, construction, or operation of a public improvement in or along a public street or highway, whereby its appropriate use or enjoyment was materially interrupted, or its value substantially impaired, was regarded as a taking of private property, within the meaning of the Constitution, to the extent of the damages thereby occasioned, and actions for such injuries were uniformly sustained."

Touching the provision in the Constitution of 1870, the court said that the framers of that instrument evidently had in view the giving of greater security to private rights by giving relief in cases of hardship not covered by the preceding Constitution, and for that purpose extended the right to compensation to those whose property had been "damaged" for public use; that the introduction of that word, so far from being superfluous or accidental, indicated a deliberate purpose to make a change in the organic law of the State, and abolished the old test of direct physical injury to the corpus or subject of the property affected. The new rule of civil conduct, introduced by the present

Constitution, the court adjudged, required compensation in all cases where it appeared "there has been some physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives to it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally." The Chief Justice concurred in the judgment, and in the general views expressed by the court, holding that while the owner of a lot on a street held it subject to the right of the public to improve it in any ordinary and reasonable mode deemed wise and beneficial by the proper public functionaries, he was entitled, under the Constitution of 1870, to compensation in case of a sudden and extraordinary change in the grade of the street or highway, whereby the value of his property is in fact impaired. Three of the justices of the State court dissented.

As we understand the previous cases of *Pekin v. Brereton*, 67 Illinois, 477; *Pekin v. Winkel*, 77 Illinois, 56; *Shawneetown v. Mason*, 82 Illinois, 337; *Elgin v. Eaton*, 83 Illinois, 535; and *Stack v. St. Louis*, 85 Illinois, 377, — all of which arose under the present Constitution of Illinois, — they proceeded upon the same grounds as those expressed in *Rigney v. Chicago*, although in no one of them did the court distinctly declare how far the present Constitution differed from the former in respect to the matter now before us.

At the same term when *Rigney's* case was decided, the State court had occasion to consider this question as presented in a somewhat different aspect. The Union Building Association owned a building and lot three and a half blocks from a certain part of La Salle Street in Chicago, which the city proposed to close up, and permit to be occupied by the Board of Trade with its building. As the streets adjacent to the plaintiff's property were to remain in the same condition as to width, etc., that they were in before, and as the closing up of a portion of La Salle Street would not, in any degree, interfere with access to its lot, or with the use and enjoyment of it, it was held that there was no special or particular injury done for which an action would lie against the city. That case was distinguished from *Rigney v. Chicago* in this, that in the latter case the court held that "property-holders bordering upon streets have, as an incident to their ownership of such property, a right of access by way of the streets, which cannot be taken away or materially impaired by the city, without incurring legal liability to the extent of the damages thereby occasioned." *City of Chicago v. Union Building Association*, 102 Illinois, 379, 397.

In *Chicago & Western Indiana Railroad v. Ayres*, 106 Illinois, 518, the court — all the justices concurring — observed: "It is needless to say our decisions have not been harmonious on this question, but in the case of *Rigney v. City of Chicago*, 102 Illinois, 64, there was a full review of the decision of our courts, as well as the courts of Great Britain, under a statute containing a provision similar to the provision in our Constitution. The conclusion there reached was, that under this

constitutional provision a recovery may be had in all cases where private property has sustained a substantial damage by the making and using an improvement that is public in its character, — that it does not require that the damage shall be caused by a trespass, or an actual physical invasion of the owner's real estate, but if the construction and operation of the railroad or other improvement is the cause of the damage, though consequential, the party may recover. We regard that case as conclusive of this question. The case of *Pittsburg & Fort Wayne Railroad Co. v. Reich*, 101 Illinois, 157, is in point on this question of damages, and the case of *City of Chicago v. Union Building Association*, 102 Illinois, 379, also reviews the authorities and approves the doctrine in *Rigney v. Chicago*, *supra*. These cases, therefore, overrule the doctrines of the earlier cases." Our attention has not been called to, nor are we aware of any subsequent decision of the State court giving the Constitution of 1870 an interpretation different from that indicated in *Rigney v. Chicago*, and *Chicago, &c. Railroad Co. v. Ayres*. We concur in that interpretation. The use of the word "damaged" in the clause providing for compensation to owners of private property, appropriated to public use, could have been with no other intention than that expressed by the State court. Such a change in the organic law of the State was not meaningless. But it would be meaningless if it should be adjudged that the Constitution of 1870 gave no additional or greater security to private property, sought to be appropriated to public use, than was guaranteed by the former Constitution.

The charge to the jury by the learned judge who presided at the trial gave effect to the principles announced in the foregoing cases arising under the present Constitution of Illinois. It covered every vital question in the case, in language so well guarded that the jury could not well have misunderstood the exact issue to be tried, or the proper bearing of all the evidence. So far as the special requests for instructions in behalf of the city contained sound propositions of law they were fully embodied in the charge to the jury.

In behalf of the city it was contended that, if liable at all, it was only liable for such damage as was done to the market value of the property by rendering access to it difficult or inconvenient. The court said, in substance, to the jury that the flooding of the lot by water running down upon it from the approaches to the viaduct was an element of damage which they might consider; though if such flooding merely caused inconvenience to the occupant in the conduct of his business, such as his coal getting wet, or its becoming more difficult to keep his scales properly adjusted, these were not elements of impairment to the value of the property for purposes of sale. The jury were also instructed that although the occupant may have found it difficult to haul coal out of the lot, and although it may have been much more unprofitable to conduct the business of selling coal at this lot, that did not weigh upon the question as to the value of the lot in the market. Other obser-

vations were made to the jury, but the court, in different forms of expression, said to them that the question was, whether, by reason of the construction of the viaduct, the value, that is, the market price, of the property had been diminished. The scope of the charge is fairly indicated in the following extract: "The real question is, has the value of this property to sell or rent been diminished by the construction of this viaduct? It may be that it can no longer be used for the purposes of a coal-yard, or for any purpose for which it has heretofore been used, but that would not be material if it can be rented or sold at as good a price for other purposes, except that if the proof satisfies you that any of the permanent improvements put on the lot for the particular business which has been heretofore carried on there, and for which it was improved, have been impaired in value, or are not worth as much after this viaduct was built and the bridge was raised as before, and you can from the proof determine how much these improvements are damaged, the plaintiff would be entitled to recover for such damage to the improvements, — that is to say, (this lot being improved for a specific purpose, if the proof satisfies you that it can no longer be rented or used for that purpose, and that thereby these improvements have been lost or impaired in value, then the impairment of value to these improvements is one of the elements of damage which the plaintiff is entitled to have considered and passed upon and included in his damage.)"

It would serve no useful purpose to examine in detail all the requests for instructions, and compare them with the charge, or discuss the questions arising upon exceptions to the admission of evidence. After a careful consideration of all the propositions advanced for the city, we are unable to discover any substantial error committed to its prejudice. It may be, as suggested by its counsel, that the present Constitution of Illinois, in regard to compensation to owners of private property "damaged" for the public use, has proved a serious obstacle to municipal improvements; that the sound policy of the old rule, that private property is held subject to any consequential damages that may arise from the erection on a public highway of a lawful structure, is being constantly vindicated; and that the constitutional provision in question is "a handicap" upon municipal improvement of public highways. And it may also be, as is suggested, doubtful whether a constitutional convention could now be convened that would again incorporate in the organic law the existing provision in regard to indirect or consequential damage to private property so far as the same is caused by public improvements. We dismiss these several suggestions with the single observation that they can be addressed more properly to the people of the State in support of a proposition to change their Constitution.

We perceive no error in the record, and the judgment is

*Affirmed.*¹

¹ See also *Osborne v. Mo. Pac. Ry. Co.*, 147 U. S. 248 (1893); *Jackson v. Chic. &c. Ry. Co.*, 41 Fed. Rep. 656 (West. D. Mo. 1890); *Peel v. Atlanta*, 85 Geo. 138 (1890); VOL. I. — 69

IN the *Case of the Philadelphia and Trenton Railroad Company*, 6 Wharton, 25, 43 (1840), in considering a statute purporting to authorize the corporation to construct and operate its road in public highways and providing no compensation, the court (GIBSON, C. J.) said: "The remaining exception is more important, because it calls in question, for specific reasons, the validity of the statute which is the foundation of

Tex. &c. Ry. Co. v. Meadows, 73 Tex. 32; *McMahon v. St. Louis, &c. Ry. Co.*, 41 La. Ann. 827; *Omaha R. R. Co. v. Janacek*, 30 Neb. 276 (1890); *Gainesville, &c. R. Co. v. Hall*, 78 Tex. 169 (1890); *Smith v. St. Joseph*, 27 S. W. Rep. (Mo. 1894).

new right
action.

In *Hot Springs R. R. Co. v. Williamson*, 136 U. S. 121, 129 (1890), LAMAR, J., for the court, said: "It is proper to add that we concur in the view taken of this case by the Supreme Court of Arkansas. That court held that the Act of Congress granting the right of way to the defendant company over the strip of land upon which its road was to be operated (which in this case was along the line of Benton Street, an original street in the town of Hot Springs, and used as such at the time of the passage of the Act) carried with it the right to construct, maintain, and operate its line of railroad therein, and to appropriate such right as a location for its turn-table and depots, and for any other purpose necessary to the operation of its road; but that it was equally clear, under the provisions of the present Constitution of the State of Arkansas, that if, in the exercise of that right, the property of an adjoining owner was damaged in the use and enjoyment of the street upon which the road was located, such owner would be entitled to recover such damages from the company. It further held that the contention of the plaintiff in error that the Act of Congress invested it with an absolute title to the street along which its road was located, and exempted it from any liability for consequential damages resulting to an abutting owner from the laying of its track in a proper and skillful manner, was founded upon cases arising under the familiar constitutional restriction that private property shall not be taken for public use without compensation, which decisions generally turned upon the question, what is a *taking*, within the meaning of such provision? That the Constitution of that State of 1878, which provides that 'private property shall not be taken, appropriated, or damaged for public use without just compensation,' has changed that rule; that all the decisions rendered under similar constitutional provisions concur in holding that the use of a street by a railroad company as a site for its track, under legislative or municipal authority, when it interferes with the rights of adjoining land-owners to the use of the street, as a means of ingress and egress, subjects the railroad company to an action for damages, on account of the diminution of the value of the property caused by such use; and, lastly, that even conceding the authority of the town of Hot Springs to pass the ordinance authorizing the company to construct and maintain the railroad embankment, track, and turn-table complained of, it cannot impair the constitutional right of the defendant in error to compensation.

"We think those views are sound and in accordance with the decisions of this court in *Pennsylvania Railroad Company v. Miller*, 132 U. S. 75, and *New York Elevated Railroad v. Fifth Nat. Bank*, decided May 5, 1890, 135 U. S. 432."

Compare *City of Pueblo v. Strait*, 36 Pac. Rep. 700 (Col. May, 1894). In this case HART, C. J., for the court, said: "The insertion of the word 'damaged' first appears in the amended Constitution of Illinois, adopted in 1870. It has since been incorporated into the constitutions of West Virginia, Pennsylvania, Arkansas, Missouri, Alabama, Nebraska, Texas, Georgia, California, Colorado, Kentucky, Montana, and the Dakotas." A previous case in Colorado is cited, in which the court "was of opinion that it [this provision] was a recognition of a new right of action not necessarily known to the common law; and this principle has been recognized since in several of the cases *supra*."

In *Omaha v. Kramer*, 25 Neb. 489, 492 (1889), the court (MAXWELL, J.), after criticising the decision in *Pa. R. R. Co. v. Marchant*, 119 Pa. 541, said: "Section 21, Article I. of the Constitution of this State provides that 'the property of no person

The Streets for city. City is but a fraction of the state and can not control the action of the whole.

the proceeding, and which is said to be unconstitutional because it impairs the obligation of contracts; by violating the chartered rights of the districts of Spring Garden and the Northern Liberties; by violating the contract under which the right of passage is assured to the inhabitants of this particular street; by taking the property of the street without compensation to the districts or individual proprietors; and by monopolizing the street in derogation of the public and private uses to

shall be taken or damaged for public use without just compensation therefor.' The section above taken, except the words 'or damaged,' was in the Constitution of 1867. Under that Constitution, if any portion of a person's real estate was taken for public use, he could recover all the damages sustained by the taking; but if none of his real estate was taken for public use he could recover nothing, although his property had been greatly damaged by such use. The provision, therefore, is remedial in its nature, and the well-known rule that, in the construction of remedial statutes, three points are to be considered, *viz.*, the old law, the mischief, and the remedy, and so to construe the Act as to suppress the mischief and advance the remedy, is to be applied. 1 Blackstone Com. 87. Applying this rule to the provision in question, and it embraces all damages which affect the value of a person's property, and includes cases like that under consideration. In other words, the words 'or damaged,' in Sec. 21, Art. I. of the Constitution, include all actual damages resulting from the exercise of the right of eminent domain which diminish the market value of private property. *Reardon v. San Francisco*, 66 Cal. 492; *Atlanta v. Green*, 67 Ga. 386; *C. & W. I. R. Co. v. Ayres*, 106 Ill. 511; *Rigney v. Chicago*, 102 Id. 64; *St. L., V. & T. H. R. R. Co. v. Haller*, 82 Id. 208; *Hot Springs R. R. Co. v. Williamson*, 45 Ark. 429; *Gottschalk v. C. B. & Q. R. Co.*, 14 Neb. 550; *Schaller v. Omaha*, 23 Id. 325.

"The fact that damages are consequential will not preclude a recovery, if the construction and operation of the public improvement is the cause of the injury; and it is not necessary that the damages be caused by trespass or an actual physical invasion of the owner's real estate. The test is: Excluding general benefits, is the property in fact damaged? If so, the owner is entitled to compensation.

"It is not within the scope of the authority of the law-making department of the government to take the property of A and give it to B, even if B has the right to condemn property for public use. This being so, it is equally beyond the power of such department to confer the right on B to damage or destroy the property of A without making compensation therefor. The right of the legislature to authorize the taking of private property for public use is based on the condition that an equivalent in value be paid to the owner. If property is diminished in actual value by reason of a public improvement, it is to the extent of the diminution taken for public use, as much so as if it was directly appropriated. The cases differ in regard to the mode of appropriation only. In the one case all the property is taken, while in the other it is taken only to the extent that it is diminished in value, and in either case the owner is entitled to be compensated for his loss. Laws are made to protect private rights, and not to destroy them, the only exception being where a party by his own fault has forfeited the same. By protecting and enforcing the rights of each individual, the rights of all are respected and secured, and the humblest person made to feel that he can suffer no wrong to his estate without receiving adequate redress. Constitutional guarantees are of little avail unless carried out in the spirit in which they were framed, and no plea of public benefits should be permitted to impoverish the owner of private property, or override a plain constitutional inhibition. If the public desire to erect works for public use, then the public — the party benefited — must bear the burden, while each owner of private property, as one of the public, in some of the modes provided by law, must pay his share of the indebtedness or expense, and thus the burdens are equalized. The judgment of the District Court is reversed, and the cause remanded for further proceedings.

But see *Randolph, Eminent Domain*, s. 154. — Ed.

So the city can not object if the legislature authorizes the city streets to be taken for this purpose. a. d. d.

Winter. Damage to be enjoyed to protect them

Reversed and remanded."

which it had been applied. This, perhaps, is the substance of all these multifarious specifications.

“What is the dominion of the public over such a street? In England, a highway is the property of the king as *parens patrie*, or universal trustee; in Pennsylvania, it is the property of the people, not of a particular district, but of the whole State; who, constituting as they do the legitimate sovereign, may dispose of it by their representatives, and at their pleasure. Highways, therefore, being universally the property of the State, are subject to its absolute direction and control. An exclusive right of ferriage across a navigable stream, which is a public highway, is grantable only by it; and the navigation of the stream may be impeded or broken up by it at its pleasure. In the construction of her system of improvements, Pennsylvania has acted on this principle. Her dams across her principal rivers to feed her canals, have injured if they have not destroyed the descending navigation by the natural channels; and this without a suspicion of want of constitutional power. The right of passage by land or by water, is a franchise which she holds in trust for all her citizens, but over which she holds despotic sway, the remedy for an abuse of it being a change of rulers, and a consequent change of the law. No person, natural or corporate, has an exclusive interest in the trust, unless she has granted it to him. Her right extends even to the soil, being an equivalent for the six per cent. thrown into every public grant as compensation for what may be reclaimed for roads; and she has acted on the basis of it; for though damages for special injuries to improvements have been allowed by the general road laws, nothing has been given for the use of the ground. This principle was broadly asserted in *The Commonwealth v. Fisher*, 1 Penns. Rep. 466.

“Such being a highway as a subject of legislative authority, in what respect is a street in an incorporated town to be distinguished from it? A municipal corporation is a separate community; and hence a notion that it stands in relation to its streets as the State stands in relation to the highways of its territory. That would make it sovereign within its precincts — a consequence not to be pretended. The owner of a town plot lays out his streets as he sees fit, or the owner of ground in an incorporated town dedicates it to public use as a street; but it follows not that the dominion of the State is not instantly attached to it. The general road law extends to every incorporated town from which it is not excluded by provision of the charter; and the statute book is full of special Acts for opening, widening, altering, or vacating streets and alleys in Philadelphia and our other cities. Were it not for the universality of the public sovereignty, the public lines of communication, by railroads and canals, might be cut by the authority of every petty borough through which they pass; a doctrine to which Pennsylvania cannot submit, and which it would be dangerous to urge. It would be strange, therefore, were the streets of an incorporated town, not public highways, subject perhaps to corporate regulation for pur-

poses of grading, curbing, and paving; but subject also to the paramount authority of the legislature in the regulation of their use by carriages, rail-cars, or means of locomotion yet to be invented, and this without distinction between the inhabitants and their fellow-citizens elsewhere. The doctrine was carried to its extent in *Rung v. Shoenberger*, 2 Watts, 23, in which it was affirmed that, though a city has a qualified property in its public squares, it holds them as a trustee for the public for whose use the ground was originally left open; and that the enjoyment of them is equally free to all the inhabitants of the Commonwealth, subject to regulations not inconsistent with the grant. In *Barter v. The Commonwealth*, 3 Penns. Rep. 259, it was inadvertently said that the title to the soil of a street is in the corporation, whose right to improve it for purposes which conduce to the public enjoyment of it, is exclusive and paramount to the right of an inhabitant. The point was only incidentally involved, and consequently not very particularly considered; but the question of title, involving, as it has done, no more than the bounds of the grant, has lain between the grantor and the grantee, or those deriving title from them. In no case has title been claimed by the corporation. In the *Union Burial Ground Company v. Robinson*, 5 Whart. 18, in which the point was elaborately argued, the contest was betwixt the grantor and a purchaser from the grantee; and though the cause was eventually decided on another ground, the court inclined to think, on the authority of many decisions, that the title to the street, even had it been opened, would have remained in the grantor; and such appears to be the principle of *Kirkham v. Sharp*, 1 Whart. Rep. 323. The legal title to the ground, therefore, remains in him who owned it before the street was laid out; but even that is an immaterial consideration; for an adverse right of soil could not impair the public right of way over it, or prevent the legislature from modifying, abridging, or enlarging its use, whether the title were in the corporation or a stranger. I take it then that the regulation of a street is given to a corporation only for corporate purposes, and subject to the paramount authority of the State in respect to its general and more extended uses; and that there would have been no invasion of chartered rights in this instance, even did either of these districts stand in a relation to the public which would impart to its charter the qualities of a compact.

“What then is the interest of an individual inhabitant as a subject of compensation under the constitutional injunction that private property be not taken by a corporation for public use without it? Even agreeing that his ground extends to the middle of the street, the public have a right of way over it. Neither the part used for the street, nor the part occupied by himself, is taken away from him; and as it was dedicated to public use without restriction, he is not within the benefit of the constitutional prohibition, which extends not to matters of mere annoyance. The injury of which he can complain, is not direct but consequential. It consists either in an obstruction of his right of passage,

which is personal; or in a depreciation of his property by decreasing the enjoyment of it; but no part of it is taken from him and acquired by the company. The prohibition, even when it precluded a seizure of private property immediately by the State, was not largely interpreted, nor was there reason that it should be, as ample compensation was obtained from her sense of justice without it. The sufferers were overpaid, and this sort of aggression was always courted as a favor. But though she usually compensated consequential damage, it was of favor, not of right. Nor did she always make such compensation. In one well-known instance she destroyed a ferry by cutting off access to the shore, without provision for the sufferer; and in *The Commonwealth v. Richter*, 1 Penns. Rep. 467, damages were unavailingly claimed from her for flooding a spring by a dam. The clause in the amended Constitution which narrows the former prohibition to a taking of private property for a public use by a corporation, is to receive the same construction; the word 'taking' being interpreted to mean, taking the property altogether; not a consequential injury to it which is no taking at all. For compensation of the latter, the citizen must depend on the forecast and justice of the legislature.

"On the subject of the next specification, it seems scarcely necessary to say that monopolies are not prohibited by the Constitution; and that to abolish them would destroy many of our most useful institutions. Every grant of privileges, so far as it goes, is exclusive; and every exclusive privilege is a monopoly. Not only is every railroad, turnpike, or canal such, but every bank, college, hospital, asylum, or church, is a monopoly; and the ten thousand beneficial societies incorporated by the executive on the certificates of their legality, by the attorney-general and judges of the Supreme Court, are all monopolies. Nor does it seem more necessary to remark, on the subject of the concluding specifications of exception to the confirmation of the report by the associate judges of the sessions alone, that the approval was an act of the court; and that they were competent to hold it.

"Proceedings affirmed." ¹

¹ Compare 1 Hare, Am. Const. Law, 371, 378-380, *Struthers v. Dunkirk, &c. Ry. Co.*, 87 Pa. 282 (1878). In *Borough of Millvale v. Evergreen Ry. Co.*, 131 Pa. 1, 22, 23 (1889), the court (GREEN, J.) cited the case of the *Phil. & Trenton Ry. Co.* as "the leading case upon this subject," and quoted with approval the following language of BLACK, C. J., in *Com. v. R. R. Co.*, 27 Pa. 354: "The right of the supreme legislative power to authorize the building of a railroad on a street or other public highway is not now to be doubted. . . . If such conversion of a public street to purposes for which it was not originally designed does operate severely upon a portion of the people, the injury must be borne for the sake of the far greater good which results to the public from the cheap, easy, and rapid conveyance of persons and property by railway. . . . The right of a company, therefore, to build a railroad on the streets of a city, depends, like the lawfulness of all its other acts, upon the terms of its charter. Of course, when the power is given in express words, there can be no dispute about it. It may also be given by implication." — ED.

STORY v. THE NEW YORK ELEVATED RAILROAD COMPANY.

NEW YORK COURT OF APPEALS. 1882.

[90 N. Y. 122.]

APPEAL from judgment of the General Term of the Court of Common Pleas in and for the city and county of New York, entered upon an order made November 10, 1879, which affirmed a judgment in favor of defendant, entered upon a decision of the court on trial at Special Term.

This action was brought to restrain defendant from constructing its road in that portion of Front Street, in the city of New York, opposite plaintiff's premises. . . . [Here follows a statement of the plaintiff's title to his lots, consisting mainly of extracts from certain deeds.]

The trial court found the following facts among others:

"Sixth. That the railway of the defendants, as proposed to be constructed on Front Street, will cause no substantial or material impediment to the passage of persons, animals, and vehicles in and along the street, and but slight obstruction to the light or air from the street.

"Thirteenth. That the title of the plaintiff and of his grantors of his said premises was derived from the grantees under the said grants from the city in some cases by devise, in some by inheritance, and in some by conveyance; and that in all the descriptions the premises are described as bounded in front on Front Street.

"Fourteenth. That Front Street occupies the strip of land which in the said grants is mentioned as Water Street, and that prior to the execution of the grants, that street was projected across the lots thereby granted and conveyed.

"Fifteenth. That shortly after the execution of the said grants, the water lots therein described were filled in by the grantees or those claiming under or through them; that by them Front Street was erected and made, and that presumably, it was erected and made as directed by one of the surveyors of the city.

"Sixteenth. That upon plaintiff's said premises is erected a warehouse, occupying the entire front and four stories high; and that since his occupation he has used the same for his office, and for the sale of the merchandise in which he deals.

"Seventeenth. That Front Street, for the length of the block in front of the plaintiff's said premises, is a street, of the width about forty-five feet; that the street-way between the curbstones is about twenty-four feet wide; that on the southerly side from the curbstone to the building is about eleven feet; that on the northerly side from the

refusalness of plaintiff's premises would be impaired. It is assumed at law did not own 1/2 the bed of the street in fee in front of a premises yet plaintiff as subsequent grantee from the city acquired the benefit of the easement that the "front st."

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curbstone to the buildings is about ten feet; and that of the space
between the curbstone and the buildings about four and one-half feet
is used for the stoops and entrances to areas, and the residue for
sidewalk.

"*Eighteenth.* That the defendants propose to construct an elevated
railroad through Front Street, in front of the plaintiff's premises, to
extend from the Battery to the Harlem River; that the general mode
of construction in Front Street, consists of a series of columns about
fifteen inches square, fourteen and one-half feet high, placed about
five inches inside the edge of the sidewalk, and carrying cross-girders,
which support four sets of longitudinal girders, upon which are placed
cross-ties for three sets of rails for a steam railroad; that the trans-
verse girders are thirty-nine inches deep, the longitudinal girders thirty-
three inches deep; that the cars which the defendants propose to run
over such railroad will have bodies eleven feet high above the tracks;
that the cars in running will project about two feet over the sidewalk
on either side of the street; that they will reach to within about nine
feet of the plaintiff's premises; and that the defendants propose to run
trains as often as once in every three minutes and at rates of speed as
high as eighteen or twenty miles an hour.

"*Nineteenth.* That the plaintiff's premises occupy the southeasterly
corner of Front and Moore streets, and that the defendants propose to
put one of their columns at that corner on the line of Moore Street, and
inside the curb line.

"*Twentieth.* That the said elevated railroad structure will to some
extent obscure the light of the abutting premises opposite to it; that
the passing trains will also to some extent obstruct such light, and give
to the light a flickering character, which would be to some extent ob-
jectionable for business purposes, when an uninterrupted light was
necessary, and to some extent impair the general usefulness of plain-
tiff's premises.

"*Twenty-first.* That the line of columns abridges the sidewalk, and
correspondingly interferes with the street, as a thoroughfare, where such
columns are located thereon.

"*Twenty-second.* That the fronts of the abutting buildings would
be exposed to observation from passengers in the passing trains, and
the privacy of those in the second or upper stories of the premises
invaded.

"*Twenty-third.* That the structure as proposed in Front Street
also will fill so much of the carriage-way of the street as is about fifteen
feet above the road-way."

Also, that the board of aldermen of the city had, by resolution duly
adopted, given its consent for the construction and operation of its road
through Front Street.

John E. Parsons and Wm. M. Evarts, for appellant. Joseph H.
Choate, for property owners. Julian T. Davies and Roger Foster, for
Caso and others. David Dudley Field, for respondent. . . .

is in Boston. A second story is built on the street; above
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never been made. Recognition of the fact that the statute is not a nullity but gives the R.R. Co a

TRACY, J. The principal question to be determined in this case is, has the plaintiff's property been taken for public use within the meaning of the Constitution of this State?

The plaintiff claims that by the true construction of the deeds from the city to his original grantors, the bed of Front (then Water) Street was included in the grant, and that he is now the owner of the fee of one-half of the bed of Front Street in front of his lots. But if this claim be not sustained, then he insists that, in the original grants of the premises in question, the city of New York covenanted with his grantors that Front Street should be and remain an open street forever. That this covenant, being for the benefit of the abutting lands, is one running with the land, and the right or privilege secured thereby constitutes property within the meaning of article 1, section 6, of the Constitution, which provides that "private property shall not be taken for public use without just compensation." . . .

The trial court finds that the grantees made and constructed the several streets mentioned in the grant, and that the plaintiff is now the owner of said lots upon which "is erected a warehouse occupying the entire front, and four stories high." The defendant insists, and the trial court found, that, by the true construction of the deed, the bed of Front Street was excepted therefrom, and never passed to the plaintiff's original grantors. . . .

Assuming the construction placed upon the grant by the court below to be correct, we have to consider the effect of such a covenant in a grant of land made by a municipal corporation having authority to lay out and open streets, and to acquire lands for that purpose. . . .

These cases are directly in point, and it follows that, by the law of this State as interpreted and held by its highest courts for the last fifty years, without criticism or doubt, the grantees of the city, by force of their grant, acquired the right to have Front Street kept forever as a public street. The street thus became what is known to the common law as the servient tenement, and the lots abutting thereon the dominant tenement. Such servitude constitutes a private easement in the bed of the street attached to the lots abutting thereon, and passed to the plaintiff as the owner of such lots. That an easement is property, within the meaning of the Constitution, cannot be doubted. This was expressly adjudicated in this court in the case of *Arnold v. The Hudson River Railroad Company* (55 N. Y. 661). Arnold owned a nail factory, together with the right to take a certain quantity of water from a creek, and to convey it over or under the surface of intervening lands to such factory to propel machinery. For this purpose he built a trunk about six feet above the surface, through which the water was conveyed. In 1850, the defendant, having acquired title to a portion of the intervening lands, constructed tracks thereon, removed the portion of the trunk over said surface without Arnold's knowledge, and constructed another trunk under the lands, through which the water was conveyed and then raised by a pen-stock into the old trunk near

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went into minute consideration of the distances and facts found concluding that considerable damage would be done. This opinion is the opinion of the Ct. There were two arguments. Little stress is laid

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1098 STORY v. NEW YORK ELEVATED RAILROAD CO. [CHAP. VI.]

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the factory. *Held*, by the concurrence of all the judges voting, that Arnold's easement was property within the meaning of Article 1, section 6, of the Constitution, and therefore could not — nor could any portion of it — be taken for public use without compensation.

In *Doyle v. Lord* (64 N. Y. 432; 21 Am. Rep. 629), this court held that a lessee of a store had an easement for the purpose of light and air, in a yard attached to the building. In *Sixth Ave. R. R. Co. v. Kerr et al.* (72 N. Y. 330), this court also held that an easement in a public street may be condemned and taken for public use.

The next question to be considered is, has the plaintiff's property been taken by the defendant, within the meaning of the Constitution of this State? To constitute such a taking it is sufficient that the person claiming compensation has some right or privilege, secured by grant, in the property appropriated to the public use, which right or privilege is destroyed, injured, or abridged by such appropriation. Has the plaintiff's easement in Front Street been destroyed, or injured, by the appropriation of the street to the uses of the defendant's road? As we have seen, the plaintiff acquired nothing more than a right to have the street kept as a public street, and this must be deemed to be held subject to the power of the legislature to regulate and control the public uses of the street.

This brings us to the question whether the occupation of the street by the defendant's road is compatible with, or destructive of its use as a public street.

Front Street is about forty-five feet in width, the road-way between the curbstones being about twenty-four feet wide.

The trial court has found as a fact that the defendant's road is to be constructed upon a series of columns about fifteen inches square, fourteen and a half feet high, placed about five inches inside the edge of the sidewalk and carrying cross girders, which support four sets of longitudinal girders, upon which are placed cross ties for three sets of rails for a steam railroad; that the girders are thirty-nine inches deep; the longitudinal girders thirty-three inches deep; that the line of columns abridges the sidewalk and correspondingly interferes with the street and thoroughfare where such columns are located thereon.

That the structure as proposed on Front Street will fill so much of the carriage-way of the street as is about fifteen feet above the road-way. The effect of such structure the court finds will be to some extent to obscure the light of the abutting premises opposite to it, and will to some extent impair the general usefulness of the plaintiff's premises and depreciate their value.

Can the street be lawfully appropriated to such a structure without making compensation to the plaintiff for his easement therein? This is a question of power. If the legislature has power to authorize such a structure, without compensation, its exercise cannot be regulated by the courts. If one road may be authorized to be constructed upon two series of iron columns placed in the street, another may be authorized

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to be supported upon brick columns, or upon brick arches spanning the street. If a superstructure may be authorized which spans the entire carriage-way at fifteen feet above the bed of the street, one may be authorized which spans the entire street, from building to building, thus excluding light and air from the street and from the property abutting thereon. Thus an open street would be converted into a covered way, and so filled with columns or other permanent structures as to be practically impassable for vehicles. The city undertook and agreed with the plaintiff's grantors that Front Street, when constructed by them, should forever thereafter continue and be kept as a public street in like manner as other streets of the same city now are or lawfully ought to be. This fixes with definiteness and precision the character of the street which the parties to the contract intended to secure. As the other streets of the city were, or lawfully ought to be, so this street was to be; it was to be an open street; one which would furnish light and air to the abutting property, and a free and unobstructed passage to the inhabitants of the city. A covenant to keep a strip of land open as a public street forever is a covenant not to build thereon, and brings this case directly within the principle of the cases of *Hills v. Miller*, *The Trustees of Watertown*, and *White v. Cowen and Bagg*, and the *Phoenix Ins. Co. v. The Continental Ins. Co.* While the legislature may regulate the uses of the street as a street, it has, we think, no power to authorize a structure thereon which is subversive of, and repugnant to the uses of the street as an open public street. Whether a particular structure authorized by the legislature is consistent or inconsistent with the uses of the street as a street must be largely a question of fact depending upon the nature and character of the structure authorized.

The court below found that the series of iron columns abridges the street, and the superstructure erected thereon obscures the light to the adjoining premises, and depreciates the value of the plaintiff's property.

The extent to which plaintiff's property is appropriated is not material; it cannot, nor can any part of it, be appropriated to the public use without compensation.

We think such a structure closes the street *pro tanto* and thus directly invades the plaintiff's easement in the street as secured by the grant of the city.

Whatever view be taken of the facts of this branch of the case, the same result must be reached. If the title to the bed of the street passed to the grantees of the city, then the public acquired a mere easement in the street, resulting from its dedication to public use, the easement resting upon the express covenant of the owner of the fee that the street shall be kept as a public street forever. The fee remained in the owner making the dedication, and he having sold lots abutting upon the street, the purchaser, as we have already seen, obtained a perpetual right of way over the space called a street to the

way. Grass plots may be laid out; lamp posts and telegraph posts erected; electric lights be made as poles occupying permanent positions in the highway

The decision is that the road is an obstruction and impediment to use of the highway as such seems to be good fly in the face of the finding of fact. Th. think this is incorrect premisses that a car is a destruction of time see p. 116 Now the public does not use every square inch of the highway

full extent of its dimensions. Whether the bed of the street was excepted from the grant of the city, and the title thereof never vested in the grantees, or whether the bed of the street was included in the grant and passed to such grantees, is of little importance, as in either event the plaintiff has a private easement of a right of way in the street, coupled with an express covenant that the entire space, marked on the map as Front Street, shall forever be kept as a public street.

The defendant's railroad, as authorized by the legislature, directly encroaches upon the plaintiff's easement and appropriates his property to the uses and purposes of the corporation. This constitutes a taking of property for public use. It follows that such a taking cannot be authorized except upon condition that the defendant makes compensation to the plaintiff for the property thus taken.

The conclusion here reached is not in conflict with the determination of this court in the cases of *The People v. Kerr* (27 N. Y. 188), *Kellinger v. Forty-Second St., etc., R. R. Co.* (50 Id. 206), and other similar cases.

We agree with Church, Ch. J., in the case last cited, that "it is not quite clear as to what was intended to be decided by the court in *The People v. Kerr*, relative to the rights of abutting owners." . . .

By the Act of 1813 the city acquired the fee in the street, in trust, however, for a particular public use. Conceding that this trust is for the benefit of the abutting owner, as well as for the public, the only right which he has in the street is the right to insist that the trust be faithfully executed. So long as the street is kept open as a public street, the abutting owner cannot complain. The question presented in the case of *People v. Kerr*, was whether the particular structure there authorized was inconsistent with the continued use of the streets as open public streets of the city. Whether it was or not was a question of fact dependent upon the nature and character of the structure there involved. The court found and determined that it was not inconsistent with the public use of a public street, but was in aid of such uses.

And in *Kellinger v. The Forty-second Street, etc., R. R. Co.* (50 N. Y. 206), this court limits the decision in the case of *The People v. Kerr*, to a "simple declaration that the legislative authority to construct a railroad on the surface of the street without a change of grade was a legitimate exercise of the power of regulating the use of public streets for public uses."

The question whether the abutting owners upon streets opened under the Act of 1813 had the right to prevent their being converted to a use destructive of their existence as public streets was not deemed by the court to be involved in that case. . . .

Had the Act in that case authorized the corporations to take permanent and exclusive possession of portions of the street, to build sidings, and to permanently occupy them with rows of cars standing in front of the stores and residences of abutting owners, and to erect permanent

depot buildings within the limits of the streets for the accommodation of their passengers, we cannot doubt that a different result would have been reached in that case. The fact that a particular structure is found to be consistent with the uses of a street is no evidence that a different structure is not inconsistent with such uses. The conclusion reached in the present case is based upon the character of the structure here involved. The language of Wright, J., in *The People v. Kerr*, that the abutting owners have no property, estate, or interest in land forming the bed of the street in front of their respective premises to be protected by the right of eminent domain, must be construed with reference to the point thus being considered. This court had held in the case of *Williams v. The New York Central R. R. Co.* (16 N. Y. 107), that where the public had acquired a mere right of way over the land of another, the laying down of railroad tracks and constructing a steam railroad in the street of a city was an enlargement of the use as understood and contemplated by the parties at the time the land was acquired, and imposed an additional burden upon the fee, and that such Act could not be authorized without compensation to the owner.

This case was cited and relied upon in support of the claim of the abutting owners; but the answer was that the abutting owners did not own the fee of the street; that such fee being in the public, the legislature might lawfully appropriate it to any public use consistent with the trust for which it was held, notwithstanding such use of a street may not have been known or contemplated at the time the land was acquired. Having parted with the fee, the abutting owner could not maintain trespass or waste, and against an Act which did nothing more than to impose an additional burden upon the fee, he could not invoke the inhibition of the Constitution that private property shall not be taken for public use without compensation. Thus understood, we think the language of Wright, J., not subject to criticism, and furnishes no support to the claim now made that the owner, whose lands were taken and are now held in trust, to be appropriated and used as open public streets forever, has no standing in court to insist that the trust shall be kept and that the streets shall not be destroyed. . . .

That this trust created by the Act of 1813 was intended to be for the benefit of the abutting owner, as well as for the public, we cannot doubt. City property has little or no value disconnected from the streets upon which it abuts. The opening of a city street makes the property abutting thereon available for the purposes of trade and commerce, and greatly enhances its value. The Act of 1813 proceeds upon the assumption of this well-known fact, and the damages sustained by reason of the taking were assessed in view of the trust assumed by the public, that such lands were to be kept as open public streets forever. The public did not assume to take the lands in fee-simple absolute, but took and paid for a lesser estate; and, in pursuance of the theory of the statute that the abutting owner has a special interest in the street, the cost of the lands was immediately assessed

back upon the abutting property. All the owner has ever received for the lands taken under this Act is the benefit accruing to his abutting property by reason of the trust for which the lands are held. Having surrendered his land in consideration of the trust assumed by the public, if the trust can now be abrogated and the streets surrendered to the uses and purposes of a railroad corporation, it follows that, by indirection, private property may be taken for public use against the consent of the owner, and without compensation.

We have examined the other cases cited by the learned counsel for the respondent, and in none of them do we find authority for the claim here made. The case of *The Transportation Company v. Chicago* (99 U. S. 635), is not in point. The injury there complained of was necessarily done in the extension of a city street. The interruption was temporary, ceasing with the completion of the work. This case is decided upon the elementary principle that the public have a right to make such use of the land taken for a street as may be deemed necessary for its proper construction, repair, or maintenance. Within this power is included the right to fix the grade of the street, and to change such grade from time to time as the necessities of the public may require; but, whether the grade be elevated or depressed, it is still a public street, to which the public have the right of free access, subject to such police regulations as may be adopted by the public authority having charge and control of the same.

The argument has been pressed upon our attention with great ability that as railroads, like streets, are intended to facilitate trade and commerce, and lands taken for either are taken for public use, the legislature may, in its discretion, appropriate the public streets of our cities to the use of railroad corporations, and this without reference to the form of their structure or the extent of the injury wrought upon property abutting thereon. This is a startling proposition, and one well calculated to fill the owners of such property with alarm. It cannot be that the vast property abutting on the streets of our great cities is held by so feeble a tenure. This court has repeatedly held that such a rule has no application where the abutting owner owns the fee of the bed of the street; and we are of opinion that in cases where the public has taken the fee, but in trust to be used as a public street, no structure upon the street can be authorized that is inconsistent with the continued use of the same as an open public street. The obligation to preserve it as an open street rests in contract written in the statute under which the lands were taken and which may not be violated by the exercise of any legislative discretion. Whatever force the argument may have as applied to railroads built upon the surface of the street, without change of grade, and where the road is so constructed that the public is not excluded from any part of the street, it has no force when applied to a structure like that authorized in the present case. The answer to the argument is that lands taken for a particular public use cannot be appropriated to a different use without further compensation; that the

authority attempted to be conferred by the legislature upon the defendant to take exclusive possession of portions of the public street, and to erect a series of iron columns on either side thereof, upon which a superstructure is to be erected spanning the street and filling the roadway at fifteen feet above the surface, thus excluding light and air from the adjoining premises, is an attempt to appropriate the street to a use essentially inconsistent with that of a public street, and in respect to the land in question violates the covenant of the city made with the plaintiff's grantors, and in respect to lands acquired under the Act of 1813 violates the trust for which such lands are held for public use.

The argument drawn from the great benefit which these roads have conferred upon the city of New York can have but little weight in determining the legal question presented in this case. No doubt these roads have added much to the aggregate wealth of the city of New York, and have greatly promoted the convenience of its citizens; but the burden of so great a public improvement cannot rightfully be cast upon a few of its citizens, by appropriating their property to the public use, without compensation. The inhibition found in the Constitution against the right of the sovereign to appropriate private property to public use without making compensation therefor was intended to secure all citizens alike against being compelled to contribute unequally to the public burdens.

We are of opinion that the law under which the defendant is incorporated authorizes it to acquire such property as may be necessary for its uses and purposes, upon making compensation therefor. This was substantially determined in the Matter of New York Elevated Railroad (70 N. Y. 327); Gilbert Elevated Railway Co. (Id. 361).

We have reached in this case the following conclusions:

First. That the plaintiff, by force of the grant of the city, made to his grantors, has a right or privilege in Front Street, which entitles him to have the same kept open and continued as a public street for the benefit of his abutting property.

Second. That this right or privilege constitutes an easement, in the bed of the street, which attaches to the abutting property of the plaintiff, and constitutes private property, within the meaning of the Constitution, of which he cannot be deprived without compensation.

Third. That such a structure as the court found the defendant was about to erect in Front Street, and which it has since erected, is inconsistent with the use of Front Street as a public street.

Fourth. That the plaintiff's property has been taken and appropriated by the defendant for public use without compensation being made therefor.

Fifth. That the defendant's acts are unlawful, and as the structure is permanent in its character — and, if suffered to continue, will inflict a permanent and continuing injury upon the plaintiff — he has the right to restrain the erection and continuance of the road by injunction.

Sixth. That the statutes under which the defendant is organized authorize it to acquire such property as may be necessary for its construction and operation by the exercise of the right of eminent domain.

Seventh. The injunction prohibiting the continuance of the road in Front Street should not be issued until the defendant has had a reasonable time after this decision to acquire the plaintiff's property by agreement, or by proceedings to condemn the same.

EARL, J. (dissenting). At the threshold of this case is presented the inquiry whether the plaintiff's lot extends to the centre of Front Street. I think it does not. . . .

For a long time anterior to the date of the deed Front Street had become like the other streets of the city, and had been maintained and kept in repair by the city. It owned the fee of nearly all the streets within its limits, and it must have been the common practice of conveyancers to exclude the streets from the grants of adjoining lots by confining measurements to the margin of the streets. Reading the precise measurements in plaintiff's deed, in the light of these circumstances I think there is little ground for dispute that his grantors intended to limit their grant to the margin of the street, and that such intent should have effect is shown by the authorities above cited.

Therefore as the plaintiff did not own any of the soil in Front Street, it matters not where the title to it rested. As to him, it may be treated as if it were in the city, and I shall so treat it in the further discussion of this case.

Whatever private rights then the plaintiff has in this street are such and such only as belong to him as an abutter upon the street. \ Such rights as he has in common with the public generally cannot be enforced in this action or in any other action in his name. \ It is not disputed that to maintain this action the plaintiff must show that in violation of the Acts under which the defendant was organized, and of the Constitution, "private property" of the plaintiff has been taken without compensation. It is not sufficient for him to show that he is injured or suffers damage from the construction or operation of defendant's railway, or that his adjoining property is deteriorated in value. He must show that his private property is in some proper sense taken, and to this effect are nearly all the authorities in this country, except in States where provision is made in the Constitution or laws that compensation shall be made for property damaged or injuriously affected, as well as for property taken. In Sedgwick on Statutory and Constitutional Law, 519, the learned author, speaking of the constitutional provision which prohibits the taking of private property for public use without compensation, says: "It seems to be settled to entitle the owner to protection under this clause the property must be actually taken in the physical sense of the word, and that the proprietor is not entitled to claim remuneration for indirect or consequential damages, no matter how serious or how clearly and unquestionably resulting from the exercise of the power of eminent domain." In Dillon on Mu-

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municipal Corporation, § 784, it is said that "although the adjoining property may be injured, still it is not, in a constitutional sense, taken for public use." In *Transportation Co. v. Chicago* (99 U. S. 635), Judge Strong said that "acts done in the proper exercise of governmental powers and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision." They do not entitle the owner of such property to compensation from the State or its agents, or give him any right of action. This is supported by an immense weight of authority." In *O'Connor v. Pittsburgh* (18 Penn. St. 187), it was held, after two arguments of the case and much consideration, that the constitutional provision for the case of private property taken for public use extends not to the case of property injured or destroyed. See, also, the cases of *Hatch v. The Vermont Central R. R. Co.* (25 Vt. 49), and *Richardson v. The Vermont Central R. R. Co.* (Id. 473), where will be found a very learned discussion of the subject and many observations quite applicable to this case. The same rule is laid down in *Ruddiff's Executors v. The Mayor, etc., of Brooklyn* (4 N. Y. 195). It was there supported by such cogent reasons and full citation of authorities as to place it beyond question in this State, and it has received the uniform sanction of our courts.

Our attention is called to two cases (*Pumpelly v. Green Bay Co.*, 13 Wall. 166; and *Eaton v. The B. C. & M. R. R.* 51 N. H. 504; 12 Am. Rep. 147), which are supposed to take a new departure in the construction of the constitutional provision we are now considering. They are spoken of in the subsequent case of *Transportation Co. v. Chicago* as "the extremest qualification of the doctrine" to be found: they hold that permanent flooding of private property may be regarded as a "taking," and thus they may be justified on the ground that there was a physical invasion of the real estate of the private owner and a practical ouster of his possession.

We should not be embarrassed by any subtle meaning to be given to the word "property" in the constitutional provision. The broad meaning sometimes given to it by law writers whose definitions are more apt to confuse than enlighten, or a meaning which can be evolved only by philologists and etymologists, was probably not in the minds of the framers of our Constitution; they must be supposed to have used the word in its ordinary and popular signification, as representing something that can be owned and possessed and taken from one and transferred to another. In popular parlance there is a distinction between taking property and injuring property. If the word is to have the broad meaning given to it by Austin and certain German and French Civilians, to whose definitions our attention has been called, then it would include every interference with and injury or damage to land by which its use and enjoyment become less convenient or valuable. Such a sense has never been given to it or countenanced in any decision involving the constitutional provision as to taking private property. If

the word is to have such a broad signification, then it was useless to provide in the English Land Clauses Act of 1845, that compensation should be made for land taken not only, but also for land "injuriously affected," and in the Constitution and laws of some of the States that compensation shall be made for both land taken and land damaged.

I do not deem it necessary to define precisely what property rights abutting owners have in the streets of the city of New York adjoining their lots. I will assume, without deciding it, that the streets cannot be absolutely closed against their consent without some compensation to them; for the limitations upon the power of the legislature in reference to closing streets have not been precisely determined in this State. (*Brooklyn Park Comm'rs v. Armstrong*, 45 N. Y. 234; 6 Am. Rep. 70; *Coster v. Mayor, etc.*, 43 N. Y. 399; *Fearing v. Irwin*, 55 Id. 486.) If the plaintiff has an unqualified private easement in Front Street for light and air and for access to his lot, then such easement cannot be taken or destroyed without compensation to him. (*Arnold v. The Hudson R. R. Co.*, 55 N. Y. 661.) But whatever right an abutter, as such, has in the street is subject to the paramount authority of the State to regulate and control the street for all the purposes of a street, and to make it more suitable for the wants and convenience of the public. The grade of a street may, under authority of law, be changed, and thus great damage may be done to an abutter. The street may be cut down in front of his lot so that he is deprived of all feasible access to it, and so that the walls of his house may fall into the street, and yet he will be entitled to no compensation (*Radcliff's Executors v. The Mayor, etc.*, *supra*; *O'Connor v. Pittsburgh*, *supra*; *Callender v. Marsh*, 1 Pick. 418); and so the street may be raised in front of his house so that travellers can look into his windows and he can have access to his house only through the roof or upper stories, and all light and air will be shut away, and yet he would be without any remedy. The legislature may prescribe how streets shall be used, as such, by limiting the use of some streets, or the parts of streets, to pedestrians or omnibuses, or carriages, or drays, or by allowing them to be occupied under proper regulations for the sale of hay, wood, or other produce. It may authorize shade trees to be planted in them, which will to some extent shut out the light and air from the adjoining houses. Streets cannot be confined to the same use to which they were devoted when first opened. They were opened for streets in a city and may be used in any way the increasing needs of a growing city may require. They may be paved; sidewalks may be built; sewer, water, and gas pipes may be laid; lamp-posts may be erected, and omnibuses with their noisy rattle over stone pavements, and other new and strange vehicles may be authorized to use them. All these things may be done and they are still streets, and used as such. Streets are for the passage and transportation of passengers and property. Suppose the legislature should conclude that to relieve Broadway in the city

of New York from its burden of travel and traffic it was necessary to have an underground street below the same; can its authority to authorize its construction be doubted? And for the same purpose could it not authorize a way to be made fifteen feet above Broadway for the use of pedestrians? When the streets become so crowded with vehicles that it is inconvenient and dangerous for pedestrians to cross from one side to another, can it be doubted that the legislature could authorize them to be bridged, so that pedestrians could pass over them, and that it could do this without compensation to the abutting owners, whose light and air and access might to some extent be interfered with? These improvements would not be a destruction of or a departure from the use to which the land was dedicated when the street was opened; but they would render the street more useful for the very purpose for which it was made, to wit: travel and transportation. If by these improvements the abutting owners were injured, they would have no constitutional right to compensation, for the reason that no property would be taken and the injury would be merely consequential. And if the public authorities could make these improvements, then the legislature could undoubtedly authorize them to be made by *quasi* public corporations, organized for the purpose, as it can authorize plank-road and turnpike companies to take possession of highways and take toll from those who use them.

So in process of time railways came to be used for transportation of persons and property; and a controversy soon arose whether they could be constructed in the streets of cities without compensation to the abutting owners. It was determined that they could not, when such owners owned the fee of the street. (*Wager v. The Troy Union R. R. Co.*, 25 N. Y. 526; *Craig v. The Rochester City & Brighton R. R. Co.*, 39 Id. 404.) But where they do not own the fee they are entitled to no compensation, as no private property is taken from them within the meaning of the Constitution. That this is the rule was distinctly recognized in the two cases last cited and was adjudicated in the cases of *The People v. Kerr* (27 N. Y. 188), and *Kellinger v. The Forty Second-Street, etc., R. R. Co.* (50 Id. 206). In the case of *The People v. Kerr*, there was uncontradicted proof that the construction and operation of the railway in the street would cause serious damage to the owners of adjoining property; and that such property would be depreciated in value from twenty to twenty-five per cent. and the court found that the construction and operation of the railway "would be a material interference with and injury to the use and enjoyment of the lots fronting on said street in such manner and to such extent that the same would constitute a continuous private nuisance to the plaintiffs" as owners of adjoining lots; and yet it held that the abutting owners were not entitled to compensation. It was adjudged that the construction of a city railroad upon the surface of the street was an appropriation to public use; that the street was under the unqualified control of the legislature, and that any appro-

priation of it to a public use by legislative authority was not a taking of private property so as to require compensation to the city or abutting owners. The decision seems to have been based upon the broad ground that the legislature could authorize the land in the street which had been taken for or dedicated to a public use to be devoted to any public use whatever. But even if it did not go so far as this, it cannot be disputed that it went so far as to hold that the legislature could authorize the streets to be devoted to any public use not inconsistent with their use as streets.

In *Kellinger v. The Street Railway Co.* the case of *The People v. Kerr* was approved, and it was held that the owners of property adjoining a street in the city of New York, laid out under the Act of 1813, have an easement in the street in common with the whole people to pass and repass and also to have free access to their premises, but that the mere inconvenience of such access occasioned by the lawful use of the street by a railroad is not the subject of an action; and that a complaint alleging that defendant laid its track so near the sidewalk in front of the plaintiff's premises as not to leave sufficient space for a vehicle to stand, and that he and his family were thereby incommoded in leaving and returning to their residence, and the rental value of his premises was greatly depreciated, did not contain a cause of action. Church, Ch. J., speaking of the case of *The People v. Kerr*, said: "It clearly holds that the abutting owners had no property in the street, which was taken for the railroad, for which they were entitled to compensation."

The decisions in these two cases were in no degree based upon the fact that the railways were constructed upon the surface of the streets. It can make no difference in principle whether the railway be on the surface or above or below the surface so long as it serves the same public purpose, to wit: the transportation of persons and property. The principle lying at the foundation of these cases, stated most favorably to the plaintiff, is that a railway was simply a new mode of using the streets for the purpose for which they were originally made, and that if the new use produced any greater inconvenience or injury to the abutting owners than the old use, it was *damnum absque injuria*. Nor did these cases proceed upon any distinction between horse railways and those upon which steam is the motive-power. If the legislature could authorize a railway to be operated in any street by horse power, it certainly must have the same right to allow it to be operated by steam, electricity, or any other motive-power. As stated by the learned author of *Thompson on Highways*, 400, "The distinction between horse railroads and those on which steam is the motive power is not made by any of the cases in the Court of Appeals, but is expressly denied by some of them, and is in conflict with the reasoning and principle of all of them." In *Wager v. Troy Union R. R. Co.*, Smith, J., writing the prevailing opinion, said: "It is true that the actual use of the street by the railroad may not be so absolute and constant as to

exclude the public from its use. With a single track, and particularly if the cars used upon it were propelled by horse-power, the interruption of the public easement in the street might be very trifling and of no practical consequence to the public at large. But this consideration cannot affect the question of right of property or of the increase of the burden upon the soil. It would present simply a question of degree in respect to the enlargement of the easement, and would not affect the principle." In the same case, Sutherland, J., in his dissenting opinion, said: "In this case the railroad, I assume, was intended to be and was operated by steam. I cannot see how that affects the question of power." In *Craig v. Rochester City, etc., R. R. Co.* (*supra*), Miller, J., writing the opinion, said: "I am at a loss to see any apparent distinction in the application of the rule between cases where steam-power is employed and those cases where the road is operated by horse-power." Judge Dillon, in his excellent work on Municipal Corporations, vol. 2, § 577, says: "Where the fee of the street is in the municipality in trust for the public, or in the public, the control of the legislature is supreme, and it may authorize or delegate to municipal bodies the power to authorize either class of railways to occupy streets without providing for compensation either to the municipality or to the adjoining lot-owners." In Cooley's Constitutional Limitations, 555, the learned author, speaking of the appropriation of the street to the use of all kinds of railroads, says: "A strong inclination is apparent to hold that, when the fee in the public way is taken from the former owner, it is taken for any public use whatever to which the public authorities, with the legislative assent, may see fit afterward to devote it in furtherance of the general purpose of the original appropriation, and if this is so, the owner must be held to be compensated at the time of the original taking for any such possible use; and he takes his chances of that use or any change in it proving beneficial or deleterious to any remaining property he may own or business he may be engaged in," and "when land is taken or dedicated for a town street it is unquestionably appropriated for all the ordinary purposes of a town street, not merely the purposes to which such streets were formerly applied, but those demanded by new improvements and new wants."

I think I have now sufficiently demonstrated that the legislature may authorize a surface railway operated by any motive-power to be constructed in public streets, and that when the abutting owners do not own the fee of the streets they cannot claim any compensation for any inconvenience or injury caused them in the construction and operation of the railway, provided the street still remains open and practicable for the ordinary use of the public; and I am entirely unable to see why the reasoning and authorities which lead to this conclusion do not lead to the further conclusion that railways operated above the surface of the street may be authorized upon the same terms. An elevated railway is only a new mode of using the streets for the transportation of persons and property. It is not a change or subversion of the use for

which the streets were originally opened and laid. The time came when the increasing business and population of the city of New York made the surface railroads a necessity. The time has now come when the convenience and the wants of a vast city make this new mode of travel and transportation, if not a necessity, at least a great convenience; and the devotion of the streets to the use of the elevated railways was only in furtherance of the trust and purpose for which the soil of the streets was originally dedicated or taken. If the surface railways were raised up fifteen feet in the streets and used for the same purpose for which they are now used, could not an Act of the Legislature make them lawful structures without compensation to the abutting owners? As relates to the question of legislative power, what difference could it make whether a railway remained upon the surface or was raised up? Are the elevated railways unlawful elevated fifteen feet above the surface of the streets, while they would be lawful lowered to the surface of the streets? The legislature in regulating any street could build an embankment fifteen feet high and then authorize a surface railroad to be built upon that, to be operated by any motive power, and the noise and dust and interruption of air and light, and disturbance of privacy might be much greater than is caused by an elevated railway. Instead of building an embankment and thus raising the street, the legislature could authorize the whole travel of the street to be carried above the surface upon an elevated road by all the vehicles used for the transportation of persons and property, and the abutting owners could have no legal or constitutional ground of complaint. This is so because the fee which the city owns in its streets extends indefinitely upward and downward, and the space above as well as the space below a street may be utilized for street purposes.

I have not claimed that the legislature could, without compensation to abutting owners, authorize a street in the city of New York to be absolutely closed or wholly and exclusively appropriated to the use of a railroad. There are authorities which would tend to uphold such a claim. I do not affirm or deny the validity of such a claim. I leave the question of the right to exercise that more extensive legislative authority under the Constitution to be determined in some future case wherein it shall be involved. It is sufficient to determine now that the legislature may constitutionally, without compensation to abutting owners, devote the streets of a great city to any use which is not inconsistent with the use for which they were opened or dedicated.

Front Street, adjoining the plaintiff's lot, is not closed by this elevated railway, but it remains an open public street. The finding of the court is that it "will cause no substantial or material impediment to the passage of persons, animals, or vehicles in and along the street, and but slight obstruction to the light or air from the street." { We must take this case as the trial court has found it and not assume a case such as the imagination can paint. } The stream of traffic and travel with no material diminution can flow through Front Street as freely as

this statement! the case should be taken as the trial court found it. A new case such as the majority imagined, should not be considered

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before the construction of the railway. If it be a question of fact whether the street is in some sense closed by the defendant's structure, then the trial court must be deemed to have found the fact in favor of the defendant.

A steam railway operated upon the surface of one of the streets in the city of New York would probably be much more damaging than an elevated railway, and yet, as I have shown, it could undoubtedly be authorized without compensation to abutting owners; and it is impossible for me to perceive upon what reasoning or theory it can be claimed, that abutting owners who have no rights upon the surface of a street for which they can claim compensation, yet have such rights when the railway is elevated above the surface. They have no easement upon or over the surface which cannot be interfered with and greatly impaired under legislative authority without compensation, and yet it is claimed that they have an easement somewhere up in the air which is under the constitutional protection as private property. Where do these aerial rights come from? They do not rest upon any grant, and as the doctrine of ancient lights has no footing in this country, they cannot rest upon prescription. Buildings may be erected upon a street so high and in such a way as to shut out light and air from an adjoining building. They may be erected so as to cast their shadows across the street upon houses there standing and yet no right or easement is invaded. It cannot be doubted that the legislature could authorize surface railways to be operated with double-decked cars fifteen feet high and thus cause nearly all the inconvenience to the abutting owners of an elevated railway, and yet it must be conceded that under the authorities the abutting owners would have no legal cause of complaint.

Light and air are mere incidents and accidents of a street. Streets are not constructed and maintained to furnish them. They come from a street because the street exists, and when the street disappears it is difficult to perceive how any right to them in an abutting owner survives. But as I have before said, it is sufficient now to determine that if there can be any such thing in a street as an easement for light and air, it is subordinate to all the uses and burdens to which a street may be subjected by the paramount authority of the legislature.

I am led to this conclusion by principles fairly to be deduced from decided cases which are binding upon this court as authority. I cannot perceive how this case can be determined in favor of the plaintiff without substantially overruling the cases of *The People v. Kerr*, and *Kellinger v. The Street Railway Co.* In *The Matter of the Gilbert Elevated Railway Co.* (70 N. Y. 361), Church, Ch. J., said that "the principles adjudicated in these cases will be regarded as obligatory upon this court in deciding future cases." In the case of *Kellinger v. The Street Railway Co.*, the same learned judge, speaking of the case of *The People v. Kerr*, said: "We should feel bound to adhere to this decision and its necessary legal results, even if we doubted its soundness, because large sums of money have been expended upon the

faith of it, and in many obvious ways it has become a rule of property which should never be abrogated, except for the most cogent reasons." And more than four hundred years before these utterances a learned English judge said: "If we judge against former judgments it is a bad example to the barristers and students of law; they will not have any faith in or give any credit to their books." (Year Book, 33 Hen. VI. 41.)

It is sufficient to say of the Elevated Railway cases reported in 70 N. Y., that the questions we are to determine in this case were not there involved. It was there determined that provision was made in the Rapid Transit Acts for compensation for any rights of private property which the abutting owners had in the streets of the city. But whether they had such rights or not was intentionally and expressly left an open question.

The plaintiff and many other abutters upon the streets through which this elevated railway is constructed undoubtedly suffer great damage from its operation and have the right to complain of the injustice done them; but they must seek their remedy by appealing, not to the courts, but to the legislature, and if they fail there, by appealing to the people who make legislatures. That is the final appeal open to every citizen who suffers injustice under the forms of the Constitution and the laws. The legislature undoubtedly has ample power to compel the defendant yet to make compensation to abutting owners for all the damage done them, and arrest the exercise of its franchise, if it shall refuse to make such compensation. (*Monongahela Nar. Co. v. Coon*, 6 Penn. St. 379.) The power which it possesses under the Constitution and the laws to alter or repeal the charters of corporations includes the absolute right to regulate the exercise of corporate franchises, and to prescribe the terms and conditions upon which they may continue to be exercised. (*Albany Northern Railroad Co. v. Brownell*, 24 N. Y. 345.)

I will close this discussion by quoting the language of a very learned jurist in *Hatch v. The Vermont Central Railroad Co.*: "In the absence of all statutory provision to that effect, no case and certainly no principle seems to justify the subjecting a person, natural or artificial, in the prudent pursuit of his own lawful business, to the payment of consequential damage to others in their property or business. This always happens more or less in all rival pursuits, and often where there is nothing of that kind. One mill or one store or school often injures another. One's dwelling is undermined or its lights darkened or its prospect obscured and thus materially lessened in value by the erection of other buildings upon lands of other proprietors. One is beset with noise or dust or other inconvenience by the alteration of a street, or more especially by the introduction of a railway, but there is no redress in any of these cases. The thing is lawful in the railroad as much as in the other cases supposed. These public works come too near some and too remote from others. They benefit many and injure

some. It is not possible to equalize the advantages and disadvantages. It is so with everything and always will be. Those most skilled in these matters, even empirics of the most sanguine pretensions, soon find their philosophy at fault in all attempts at equalizing the ills of life. The advantages and disadvantages of a single railway could not be satisfactorily balanced by all the courts of the State in forty years; hence they must be left, as all other consequential damage and gain are left, to balance and counterbalance themselves as they best can."

The judgment should be affirmed.

For reversal, ANDREWS, Ch. J., RAPALLO, DANFORTH, and TRACY, JJ. For affirmance, MILLER, EARL, and FINCH, JJ.

Judgment reversed.

[The opinion of DANFORTH, J., concurring, and the dissenting opinions of MILLER, J., and FINCH, J., are omitted. The opinions of DANFORTH, J., and TRACY, J., are each entitled by the reporter "Opinion of the court." This title seems to belong, properly, only to the last. They take substantially the same ground, but the former also holds that the plaintiff had the fee of the street.¹]

See page 114 - note.

¹ See Randolph, Em. Dom. ss. 404, 416. Compare *Fulton v. Short Route Ry. Co.*, 85 Ky. 640 (1887). *Sperb v. Met. El. Ry. Co.*, 32 N. E. Rep. 1050 (N. Y. Jan. 1893).

In *Lahr v. Metrop. Elev. Ry. Co.* 104 N. Y. 268 (1887), the court (RUGER, C. J.) said: "This action is the sequel of the Story case (*Story v. N. Y. El. R. R. Co.*, 90 N. Y. 122), and its defence seems to have been conducted, upon the theory of securing a re-examination of the questions then decided, and in case that effort should prove fruitless, of limiting and restricting as much as possible, their logical effect.

"The endeavor to secure a re-examination of the doctrines of that case must fail, since the decision there made embodied the deliberate judgment of the court, pronounced after the most careful and thorough consideration, and after two arguments at the bar, made by most eminent counsel, had apparently exhausted the resources of learning and reason in the discussion of the questions presented.

"It would be the occasion of great public injury, if a determination thus made could be inconsiderately unsettled and suffered again to become the subject of doubt, and theme of renewed discussion.

"The reasons advanced by the able counsel for the appellant to induce us to reconsider that case, seem to us to be insufficient to render it wise or expedient to do so. The doctrine of the Story case therefore, although pronounced by a divided court, must be considered as stare decisis upon all questions involved therein, and as establishing the law, as well for this court as for the people of the State, whenever similar questions may be litigated.

"Wherever, therefore, the principles of that case logically lead us we feel constrained to go, and give full effect to the rule therein stated, that abutters upon public streets in cities are entitled to such damages, as they may have sustained by reason of a diversion of the street, from the use for which it was originally taken, and its illegal appropriation to other and inconsistent uses.

"The case is not only authority upon the questions which it expressly decides, but also upon all such as logically come within the principles therein determined.

"It is therefore unnecessary to enter into a general discussion of those questions, but after restating such propositions as seem to be controlling in this case, we shall simply refer to some alleged distinctions between the present case and the Story case. We hold that the Story case has definitely determined:

"First. That an elevated railroad, in the streets of a city, operated by steam-power and constructed as to form, equipments, and dimensions like that described in the

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Story case, is a perversion of the use of the street from the purposes originally designed for it, and is a use which neither the city authorities nor the legislature can legalize or sanction, without providing compensation for the injury inflicted upon the property of abutting owners.

"Second. That abutters upon a public street claiming title to their premises by grant from the municipal authorities, which contains a covenant that a street to be laid out in front of such property, shall forever thereafter continue for the free and common passage of, and as public streets and ways for the inhabitants of said city, and all others passing and returning through or by the same, in like manner as the other streets of the same city now are or lawfully ought to be, acquire an easement in the bed of the street for ingress and egress to and from their premises, and also for the free and uninterrupted passage and circulation of light and air through and over such street for the benefit of property situated thereon.

"Third. That the ownership of such easement is an interest in real estate, constituting property within the meaning of that term, as used in the Constitution of the State, and requires compensation to be made therefor, before it can lawfully be taken from its owner, for public use.

"Fourth. That the erection of an elevated railroad, the use of which is intended to be permanent, in a public street, and upon which cars are propelled by steam-engines, generating gas, steam, and smoke, and distributing in the air cinders, dust, ashes, and other noxious and deleterious substances, and interrupting the free passage of light and air to and from adjoining premises, constitutes a taking of the easement, and its appropriation by the railroad corporation, rendering it liable to the abutters for the damages occasioned by such taking.

"The jury in this case, under the instructions of the court, have found, upon evidence which justifies the finding, that the structure of the defendant in Amity Street, in connection with the running of cars thereon, propelled by steam engines with the consequences naturally flowing therefrom, constitutes an employment of the street for purposes not originally designed and a perversion of its use, from legitimate street purposes. . . .

"The logical effect of the decision in the Story case is to so construe the Constitution, as to operate as a restriction upon the legislative power over the public streets opened under the Act of 1813, and confine its exercise to such legislation, as shall authorize their use for street purposes alone. Whenever any other use is attempted to be authorized, it exceeds its constitutional authority. Statutes relating to public streets which attempt to authorize their use for additional street uses, are obviously within the power of the legislature to enact, but questions arising under such legislation are inapplicable to the questions here involved.

"Such are the cases in respect to changes of grade; the use of a street for a surface horse railroad; the laying of sewers, gas, and water pipes beneath the soil; the erection of streets lamps and hitching posts, and of poles for electric lights used for street lighting. All of these relate to street uses sanctioned as such by their obvious purpose, and long continued usage, and authorized by the appropriation of land for a public street. . . .

"But a single question of any importance remains to be discussed, and that refers to the claim made, that the defendant is not liable for the operation of its trains, and the consequences flowing therefrom, in respect to the manufacture and distribution in the air of gas, smoke, steam, dust, cinders, ashes, and other unwholesome and deleterious substances from its locomotives and trains, as they move to and fro over its tracks.

"We have been unable to see any reason why the defendant should not be liable for the injury thus occasioned, provided the evidence established the fact that they were destructive of the easements of light, air, and access belonging to the plaintiff.

"It follows necessarily from the proposition that a permanent structure erected in a street, interrupting to any considerable extent the passage of light and air to adjacent premises, works the destruction of easements for such purposes; that any incident of the structure which necessarily increases and aggravates the injury must be subject to the same rule of damage.

the whole structure was unlawful.

"No partial justification of the damages inflicted by an unlawful structure, and its unlawful use, can be predicated upon the circumstance, that under other conditions and through a lawful exercise of authority, some of the consequences complained of, might have been produced without rendering their perpetrator liable for damages.

"The structure here, and its intended use, cannot be separated and dissected, and it must be regarded in its entirety in considering the effect which it produces upon the property of the abutter. However the damage may be inflicted, provided it be effected by an unlawful use of the street, it constitutes a trespass rendering the wrong-doer liable for the consequences of his acts.

"The legislature, as we have seen, had no power to authorize the street to be used for an elevated steam railroad, and that want of authority extends to every incident necessary to make the road an operative elevated steam railroad, which occasions injury to the rights of abutters on the street. (*Balt. & Pot. R. R. Co. v. Fifth Bap. Ch.*, 108 U. S. 317, 329.) . . .

"ANDREWS and DANFORTH, JJ., concur. RAPALLO, J., took no part. EARL and FINCH, JJ., concur in result, handing down the following memorandum.

"EARL and FINCH, JJ., not being able to concur in all the views expressed in the foregoing opinion, concur in the result on the authority of the Story case (90 N. Y. 122); deeming it necessary to add that, while they are unwilling to extend the scope of the decision in that case beyond its fair import, yet in their opinion it gives to abutting owners only damages for the construction and operation of the railway in front of their premises, resulting from the taking or destruction of their street easements of light, air, and access, and for such damages to their adjoining property as are necessarily caused by such taking and destruction; that the abutters cannot recover damages to or upon their abutting property caused by the lawful operation of the road, and not by the deprivation or destruction of their easements in the street; that there can be no recovery for any thing done by the railway in the street except as it deprives, or tends to deprive, the abutters of the easements mentioned, and that they believe these principles were not violated upon the trial of this action. Judgment affirmed."

In *Fobes v. The Rome, Watertown, & Ogd. R. R. Co.*, 121 N. Y. 505 (1890) the plaintiff, as owner of real estate in Syracuse bounded by the side line of Franklin Street, brought an action to restrain the defendant from interference with, and occupation of, his easement of light, air, and access in and to that street, by the maintenance and operation of its steam railway therein, and to recover past damages suffered by him from such maintenance and operation.

In reversing a judgment below in favor of the plaintiff, the court (PECKHAM, J.) after citing *Drake v. Hudson Riv. R. R. Co.*, 7 Barb. 508, *Williams v. N. Y. C. R. R. Co.*, 16 N. Y. 97, *Wager v. T. U. R. R. Co.*, 25 N. Y. 526, and *People v. Kerr*, 27 N. Y. 188, said: "I think there is no authority in this court which holds that there is any difference between a railroad operated by horse-power and one operated by the power of steam in the streets of a city. If the legislature can authorize the one, it can, under the same circumstances, authorize the other. I refer to railroads on the same grade as the street itself, and where the chief difference lies in the different motive-powers which are used.

"In *Craig v. R. R. C. & B. R. Co.* (39 N. Y. 404), it was held that the owner of a lot on a street, who owned the fee thereof subject only to the public easement for a street, was entitled to compensation for the new and additional burden upon the land so used as a street, by the erection of even a horse railroad thereon. In this case, Judge MILLER said he saw no distinction in the application of the rule between cases of steam and cases of horse-power.

"In *Kellinger v. F. S. S. & G. S. F. R. R. Co.* (50 N. Y. 206), it was held that one who did not own the fee of the street, could not recover damages for inconvenience of access to his adjoining lands caused by the lawful erection of a street railroad through the street.

"By these last two decisions, it is seen, that to construct even a horse railroad in a city street, is to place a new and additional burden upon the land, the right to do

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"Assuming that the plaintiff had no title whatever to the land in the street through which the defendant laid its rails and ran its trains under legislative and municipal authority, I think it clear that prior to the decision of this court in the Story case (90 N. Y. 122) he had no cause of action against the defendant based upon any alleged taking of the plaintiff's property or easement by defendant. If its user of the street became excessive or exclusive, and hence degenerated into a nuisance, the plaintiff had another remedy. The claim is now made that the Story case (*supra*), and those cases which followed and are founded upon it, so far altered the law as to permit a recovery in all cases where the easement of the adjoining lot-owner, through the building and operation of the road, is injuriously affected by any deprivation or diminution of light, air, or access to his lot, even though he do not own the fee to the centre of the street; and, where such injury occurs, it is claimed that the property of the owner in his easement of light, air, or access has been taken to a greater or less extent, and compensation is guaranteed to him therefore by the Constitution.

"It was not intended in the Story case to overrule or change the law in regard to steam surface railroads. (The case embodied the application of what was regarded as well established principles of law to a new combination of facts, such facts amounting, as was determined, to an absolute and permanent obstruction in a portion of the public street, and in a total and exclusive use of such portion by the defendant, and such permanent obstruction and total and exclusive use, it was further held, amounted to a taking of some portion of the plaintiff's easement in the street for the purpose of furnishing light, air, and access to his adjoining lot. This absolute and permanent obstruction of the street, and this total and exclusive use of a portion thereof by the defendant were accomplished by the erection of a structure for the elevated railroad of defendant, which structure is fully described in the case as reported. The structure, by the mere fact of its existence in the street, permanently and at every moment of the day took away from the plaintiff some portion of the light and air which otherwise would have reached him, and in a degree very appreciable, interfered with and took away from him his facility of access to his lot; such interference not being intermittent and caused by the temporary use of the street by the passage of the vehicles of the defendant while it was operating its road through the street, but caused by the iron posts and by the superstructure imposed thereon, and existing for every moment of the day and night. (Such a permanent, total, exclusive, and absolute appropriation of a portion of the street as this structure amounted to, was held to be illegal and

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wholly beyond any legitimate or lawful use of a public street. The taking of the property of the plaintiff in that case was held to follow upon the permanent and exclusive nature of the appropriation by the defendant of the public street or of some portion thereof. If that appropriation had been held legal, any merely consequential damage to the owner of the adjoining lot, not having any title to the street, would have furnished no ground for an action against the defendant. It was just at this point that the disagreement existed between the members of this court in the Story case. The judge who wrote one of the dissenting opinions did not think that the facts presented any different principle from that of an ordinary steam surface railroad operating its road through the streets of a city under the authority of the legislature and of the municipality, in a case where the adjoining lot owner did not own the fee in the street. The character of the structure, and all the facts incident thereto, were regarded by him as simply resulting in an additional burden upon the street, somewhat greater in degree it is true than a steam surface railroad, but still it was such a use of the street as the legislature might permit, and the legislature having in fact granted it such power, the use of the street was, therefore, legal, and the defendant was not responsible for the incidental damage resulting to one whose property was not in fact taken within the meaning of the constitutional provision, and the defendant did him, therefore, no actionable injury. The other dissenting judges were of the same opinion.

"A majority of the court, however, saw in the facts existing in that case what was regarded as a plain, palpable, and permanent misappropriation of the street, or some portion of it, to the exclusive use of the defendant corporation, and as resulting from it the court held that there was a taking of property belonging to the plaintiff without compensation, which no legislature could authorize or legalize. But this taking, it cannot be too frequently or strongly asserted, resulted from the absolute, exclusive, and permanent character of the appropriation of the street by the structure of the defendant. There is no hint in either of the prevailing opinions in the Story case of any intention to interfere with or overrule the prior adjudications in this State upon the subject now under discussion, as to the steam surface railroads. In the Story case it was argued that no real distinction in principle existed between a steam surface and an elevated railroad resting on such a structure as was proved in that case. This court, however, made the distinction, and the two prevailing opinions are largely taken up with arguments going to show the distinction was obvious, material, and important, and was so real and tangible in fact as to call for a different judgment than would have been proper and appropriate in the case of the ordinary steam surface railroad such as the Drake case was.

"Judge Tracy, in the Story case, said that the conclusion therein reached was based upon the character of the structure, and that the language of Judge Wright in the Kerr case (*supra*), where he asserted that the abutting owners had no property or estate in the land forming the bed of the street in front of their premises, must be construed with reference to the point then considered. In another portion of his opinion Judge Tracy said that no structure upon the street can be authorized which is inconsistent with the continued use of the street as a public street. He also added that, whatever force the argument may have as applied to railroads built upon the surface of the street, without change of grade, and where the road is so constructed that the public is not excluded from any part of the street, it has no force when applied to a structure like that authorized in the present case. (This, he says, is an attempt to appropriate the street to a use essentially inconsistent with that of a public street, and hence illegal.) He does not pretend that the ordinary steam railroad, laid on the same grade as the street, and not excluding others from its use, appropriates the street to a use essentially or at all inconsistent with that of a public street. The use may be an additional burden laid upon the street, but nevertheless it is such a use as is entirely consistent with its continued use as a public street.

"Judge Danforth in his opinion, views the structure in much the same light. He cites the case of *Corning v. Lowerre* (6 Johns. Ch. 439), where Chancellor Kent restrained the defendant by injunction from obstructing Vesey Street in New York city by building a house thereon, and he says that the railroad structure designed by the

defendant for the street opposite the plaintiff's premises is liable to the same objection, that is, it is as permanent in its character and exclusive in its possession of that portion of the street, as was the defendant's building in the case cited. He further says that the street railway cases are in no respect in conflict with the doctrine announced in his opinion. Other citations might be made from both opinions of those most learned and able judges, but enough has been shown to enable us to say with entire correctness that there was no intention in deciding the Story case to reverse or overrule the cases in regard to steam surface railroads which have been already cited. Those cases include just such a case as is the one at bar.

"Following the Story comes the Lahr case (104 N. Y. 268), and the principles decided in the former were reiterated in the latter case. It is difficult to see that any enlarged rule as to awarding damages in that class of cases has been definitely announced in the Lahr case. The general rule to be adopted was agreed upon by the parties and involved an award once for all. The particular damage which the defendant was liable for, growing out of the existence of the defendant's structure, was held by three of the five members of the court then voting to embrace such an injury or inconvenience as was incidental to the use thereof. Two of the five members were in favor of a more restricted rule, and they agreed simply in the result which affirmed the judgment of the court below.

"Then came the Drucker case (106 N. Y. 157), and in it the principle was announced, as stated in the head note, that in awarding damages it was proper to prove and take into consideration as elements of damages the impairment of plaintiff's easement of light caused by the road itself, and passage of trains, and the interference with the convenience of access caused by the drippings of oil and water. This was held as a fair result from a holding that the structure was an illegal one, and to the extent above described the court held the plaintiff entitled to an award of damages. But the foundation for the recovery in all the cases above cited, of any damages whatever, lies in the fact of the illegality of the structure.

"Looking carefully over the cases involving the elevated railroads and their rights and liabilities, we cannot see that any new rule was adopted in any of those cases which would hold the defendant herein liable under the facts proved, for the taking of any property or any portion of an easement belonging to the plaintiff. On the contrary we think the plaintiff's case is still governed by the case of Drake and the other cases in this court which have already been cited, and in which the principle decided in the Drake case has been assented to and affirmed. Upon such facts it has been held that there was no taking of any property or easement of an adjoining owner who had no title to any portion of the land upon which the street was laid out, where the company was authorized by law and licensed by the city to use the street."

In *Pond v. The Metrop. Elev. Ry. Co.* 112 N. Y. 186 (1889) the court (ANDREWS, J.) said: "The Story case (90 N. Y. 122) established the principle that an abutting owner on streets in the city of New York, possesses, as incident to such ownership, easements of light, air, and access in and from the adjacent streets, for the benefit of his abutting lands, and that the appurtenant easements and outlying rights constitute private property of which he cannot be deprived without compensation. That was an equity action and the court having reached the conclusion that the defendant's structure was an unlawful invasion of the plaintiff's easements, granted an injunction, postponing its actual issuance, however, until after such reasonable time as would enable the defendant to acquire the plaintiff's right by voluntary agreement or compulsory proceedings. The Story case did not determine any rule of damages. But in *Ulm v. N. Y. C. & H. R. R. Co.* (101 N. Y. 98), the general question as to the scope of the remedy in an ordinary legal action for damages sustained by an abutting owner from the construction of a railway in the street fronting his premises, without his consent and in violation of his rights, was elaborately considered, and it was determined that in such an action the plaintiff could recover temporary damages only; that is, such damages as had been sustained up to the commencement of the action, and the judgment below which allowed damages measured by the permanent depreciation in the value of the plaintiff's lots upon the assumption that the trespass and wrong would be con-

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In *Reining v. The New York, Lackawanna, and Western Ry. Co.*, 128 N. Y. 157 (1891), the court (ANDREWS, J.) said: "The principal question in this case respects the rights of the plaintiffs as abutting owners, to recover damages occasioned by the construction of the defendant's road in Water Street in the city of Buffalo. The plaintiffs' premises are situated on the northerly side of Water Street, and are

continued, was reversed. The case of *Lahr v. Met. El. R. Co.* (104 N. Y. 270), was an action like the present one, brought by an abutting owner for damages in which the plaintiff recovered the permanent depreciation in value of his premises by reason of the construction and operation of the defendant's road, on the theory that the appropriation and invasion of the plaintiff's easement was final and complete. This court affirmed the judgment, stating in its opinion that the case was taken out of the operation of the *Uline* case (*supra*), for the reason that the record disclosed that the parties had agreed upon the rule of damages. The plain inference is, that except for this, the doctrine of the *Uline* case would have controlled and the objection to the measure of damages would have prevailed. The case of *New York National Bank v. Metropolitan Elevated Railway Company* (108 N. Y. 660), is a still more explicit recognition by this court of the application of the doctrine of the *Uline* case to actions like this. That was an equitable action, brought by an abutting owner, and was sustained. The plaintiff was awarded judgment for past loss of rentals, and an injunction was granted restraining the further operation and maintenance of the road, unless the defendants paid a certain sum equal to the amount of depreciation in the value of the property, as for a permanent appropriation. There was no ground for maintaining the action for equitable relief upon any circumstances disclosed in the complaint, provided the plaintiff could have recovered permanent and complete damages, as for an actual taking of his easement, in a legal action. We think these cases have settled the rule that permanent depreciation cannot be recovered in an action like this. It is understood that this has been the interpretation of our decisions upon which the courts below have acted in many cases. It might be productive of less inconvenience, on the whole, if an opposite rule could be adopted. But the rule established is consistent with legal principles. A recovery of judgment for damages for a trespass or the invasion of an easement does not operate to transfer the title of the property to the defendant, either before or after satisfaction, nor does it extinguish the easement. By the ordinary rule it is an indemnity for a past wrong, leaving unaffected the plaintiff's right to his property. When he comes to the court for equitable relief, the court may mould it to suit the circumstances, as was done in *Henderson v. N. Y. C. R. R. Co.* (78 N. Y. 423). The present case was an action for damages simply. The plaintiff neither in his complaint nor on the trial asked for equitable relief.

"We think the judgment should be reversed and a new trial granted. All concur. Judgment reversed."

"The law of the State of New York as declared by the Court of Appeals, appears to be as follows: An elevated railroad erected in and over a street pursuant to the statutes of the State, and with due compensation to the owners of property taken for the purpose, is a lawful structure. The owners of lands abutting on a street in the city of New York have an easement of way, and of light and air, over it; and through a bill in equity for an injunction, may recover of the elevated railroad company full compensation for the permanent injury to this easement; but, in an action at law, can not, without the defendant's acquiescence, recover permanent damages, measured by the diminution in value of their property, but can recover such temporary damages only as they have sustained to the time of commencing the action. [Citing cases.] This rule of damages at law has not prevailed in analogous cases decided in other jurisdictions, and collected in the briefs of counsel; and in the case last above cited the court observed that 'it might be productive of less inconvenience on the whole, if an opposite rule could be adopted.' 112 N. Y. 190." GRAY, J. for the court, in *N. Y. Elev. R. R. v. Fifth Nat. Bk.*, 135 U. S. 432, 440 (1889). — ED.

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bounded easterly by Commercial Street, westerly by Maiden Lane, and southerly by Water Street, and occupying the whole lot is a four-story brick building used as a store and residence, constructed before the railroad was placed in Water Street. Water Street runs easterly and westerly, and has existed for more than forty years. Up to 1875, the plaintiffs owned the fee to the centre of the street opposite their premises, subject to the public easement. In that year proceedings were taken by the city of Buffalo to acquire the title to a large number of streets in Buffalo, including Water Street, by condemnation, and resulted in the city acquiring the title, upon payment of a uniform and nominal award of five cents damages to each of several hundred owners of lots on the streets taken including the plaintiffs.

"In 1882, the Common Council of the city of Buffalo by ordinance granted to the defendant the right to construct and maintain two railroad tracks 'along Prince Street to a point midway between Hanover Street and Lloyd Street, thence across Lloyd Street at such grade as will permit said company with a practical construction to cross Commercial Street at the height fixed by the State engineer; thence to and along the centre of Water Street to the docks of the Delaware, Lackawanna, and Western Railroad Company at the foot of Erie Street.' Commercial Slip is a part of the Erie Canal and separates Prince Street and Water Street, and together they form a continuous street except as it is interrupted by Commercial Slip. The defendant, in pursuance of the permission of the Common Council, and in accordance with the map and profile approved by the council, and under the direction of the city engineer, proceeded to raise the grade on Prince Street so as to enable the company to cross Commercial Slip by a bridge fourteen feet above the water line, the height fixed by the State engineer, and to meet this grade of the bridge constructed an embankment in the centre of Water Street from the bridge easterly for the distance of 300 feet, passing the plaintiffs' premises. Water Street is sixty-six feet wide. The sidewalk on the Water Street side of the plaintiffs' lot occupies fourteen feet. The embankment of the defendant is twenty-four feet wide, and at the junction of Water and Commercial streets (at the corner of which is the plaintiffs' lot), it is five feet nine inches high, and from that point descends westerly by a gradual descent passing the plaintiffs' lot and across Maiden Lane and reaches the original level of the street nearly 300 feet west of the corner of Commercial and Water streets. The embankment is supported laterally by solid, perpendicular stone walls, which extend along Water Street in front of the plaintiffs' lot and across the entrance of Maiden Lane. Between the perpendicular stone wall on the northerly side of the embankment and the sidewalk in front of the plaintiffs' building is a space eight to nine feet wide, which is the only carriage-way left on the Water Street side of the plaintiffs' premises. Commercial Street extends northerly and southerly from Main Street to Buffalo harbor. The raising of the embankment in Water Street rendered it necessary to make an embank-

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ment in Commercial Street to meet the grade of the railroad, and this was done by the defendant. The defendant paved the surface of the twenty-four feet strip in Water Street occupied by its embankment, and laid thereon part of the way one track, and part of the way two tracks for the accommodation of its business. Carriages or teams cannot cross Water Street in front of plaintiffs' premises. This is prevented by the embankment. Access to their premises on the Water Street side from Commercial Street south of Water Street is also prevented except by first crossing Water Street, and then passing along the embankment on Commercial Street 130 feet, and then turning into the roadway on Commercial Street between the embankment in that street and the sidewalk, and thence into Water Street, or else, when reaching the junction of Commercial and Water streets by turning west and driving down the embankment along the railroad tracks about 300 feet to the end of the grade, and then turning and going easterly along the narrow roadway eight or nine feet wide on the northerly side of the embankment. This space is not sufficient to allow wagons to pass each other, nor can a single wagon with horses be turned around in this space except with difficulty.

"It was conceded that the plaintiffs, up to the time of the trial, had sustained damages in the diminished rental value of their premises by reason of the embankment in the sum of \$525, for which sum a verdict was rendered, and no question now arises as to the rule of damages or the amount, provided, upon the facts, damages are legally recoverable. . . . [Here follows a statement of the defendant's position and of *Fobes v. R. W. & O. R. R. Co.*, 121 N. Y. 505 (*ante*, p. 1115).]

"It is no longer open to debate in this State that owners of lots abutting on a city street, the fee of which is in the municipality for street uses, although they have no title to the soil, are nevertheless entitled to the benefit of the street in front of their premises for access and other purposes, of which they cannot be deprived except upon compensation. The right of abutting owners in the streets is not, however, of that absolute character that they can resist or prevent any and all interference with the street to their detriment, or which can be asserted to stay the hand of the municipality in the control, regulation, or improvement of the streets in the public interest, although it may be made to appear that the privileges which they had theretofore enjoyed, and the benefits they had derived from the street in its existing condition, would be curtailed or impaired to their injury by the changes proposed.

"The cases of change of grade furnish apposite illustrations. They proceed on the ground that individual interests in streets are subordinate to public interests, and that a lot owner, although he may have built upon and improved his property with a view to the existing and established grade of the street, and relying upon its continuance, has no legal redress for any injury to his property, however serious, caused by a change of grade, provided only that the change is made under lawful authority. This, it is held, is not a taking of the abutting owner's prop-

to appropriate a part of the highway for purposes of the railroad. is an singular question that would be good. In the doctrine of the Story case this case is O.K.

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REINING v. NEW YORK, LACKAWANNA, ETC. RY. [CHAP. VI

erty, and the injury requires no compensation. The hardships arising from the application of this rule of law has led to constitutional amendments in many of the States, providing for compensation for property damaged as well as taken in the prosecution of public improvements. The general rule in this State is unchanged, but the Act, chap. 113 of the Laws of 1883, and provisions in some city charters, afford similar relief in certain cases. But that there is a limitation to public powers over the streets of a city, which cannot be transgressed without invading the constitutional rights of abutting owners, was a principle announced in the Story case (90 N. Y. 122), and confirmed and broadened so as to apply to other circumstances in the subsequent cases. The elevated railroad structure, the subject of complaint in the Story case, occupied with its supports and stairways portions of the street, and such occupation was necessarily exclusive, and this fact was prominently brought into view in the opinions delivered. The parts of the street so occupied could not be used for general street purposes. This fact, it is claimed, distinguishes the present case from that, and it is insisted, that this case is more nearly allied to the Fobes case than to that of Story. It is true that the part of the street occupied by the embankment of the defendant is still a part of Water Street. It is also true that the occupation of the embankment by the tracks of the defendant was not necessarily exclusive, that is to say, it is possible for ordinary vehicles to traverse the embankment longitudinally, but such travel would subject the traveller to the risk of meeting railway trains on the narrow causeway, and he would have no opportunity to turn off the embankment, except by driving over the perpendicular wall which supports it. The plaintiffs are practically excluded from the use of that portion of the street by the presence of the railroad there. They and their customers cannot drive across it, and if they had the temerity to drive along it, nevertheless they would be compelled to make a long circuit to reach the plaintiffs' premises from the streets south of the embankment. The only practicable roadway in front on Water Street is but a few feet in width, quite insufficient for a safe and convenient way to and from their lot.

"We think the public cannot justly demand such a sacrifice of private interests, or justify such an appropriation of a street by a municipality in aid of a railroad enterprise. The Fobes case gives no countenance to the defendant's contention. The limitations upon legislative and municipal authority, so carefully stated in the passages quoted from the opinion, are distinctly opposed to such an assumption. That case, and those of Kerr and Kellinger, were cases of railroad tracks laid upon the general grade of city streets, as such grade existed when the tracks were authorized. There was no exclusive appropriation in fact of any portion of the surface by the companies, except that the rails were embedded in the soil. The whole street in each of these cases remained opened and unobstructed, except that the existence of the tracks and the operation of the respective roads thereon rendered

access to the lots of the abutting owners somewhat less safe and convenient than before. Here, as the evidence tends to show, the city of Buffalo, for the convenience and presumably upon the application of the defendant, devoted the centre of Water Street to what is practically the exclusive use of the defendant, leaving for the use of the plaintiffs a narrow and inconvenient roadway, separated from the centre of the street by a barrier therein, impassable for carriages from north to south, opposite the plaintiffs' lot on Water Street, and only theoretically open from east to west, and then only by a circuitous route. It is quite probable that the general interests of Buffalo and of the larger public are promoted by this appropriation of the street, but it by no means follows that a lot-owner whose property is injured should bear the loss for the public benefit. We think the case falls within the principle of the Story case, and that while the law now is that it is competent for the legislature to authorize railroad tracks, either for steam or horse railroads, to be laid on the ordinary grade of streets, the fee of which is in the State or municipality, without making compensation to abutting owners for consequential injuries to their property, the legislature cannot legally authorize structures for railroad purposes to be erected therein for the use and convenience of railroads, which practically exclude the abutting owners from the part of the street so occupied, without compensating them for the injury suffered, and that it is not necessary that there should be an actual physical exclusion of the lot-owners from the use of that part of the street occupied by such structures in order to entitle them to a legal remedy. It is enough if such part of the street is practically and substantially closed against them for ordinary street uses.

"The power conferred by the charter of Buffalo upon the Common Council to 'permit the track of a railroad to be laid in, along or across any street or public ground' (Laws 1870, chap. 519, tit. 3, § 19), must be construed as subject to the qualification that no property rights of abutting owners are thereby invaded. The present controversy could not have arisen prior to 1875, when the plaintiffs were owners of the fee to the centre of Water Street. They would then, under the settled law, have been entitled to compensation. The city of Buffalo having in that year acquired, for a nominal consideration, the technical fee in the street, proceeded afterwards to authorize the laying of the tracks in question, and it is now claimed that this change in the title defeats the plaintiffs' right to compensation. This is probably true, if what has been done by the defendant under license of the city was simply the laying of its tracks on the surface of the street at its ordinary grade, but this was not the character of the change effected.

"The second proposition of the counsel of the defendant that the building of the embankment was a mere change of grade of Water Street, made under the authority of the city, is, we think, untenable. The charter of Buffalo gives plenary power to the city to fix and change the grade of streets by formal proceedings, and provides that when a

grade is established or altered, a description of such grade shall be made and recorded by the city clerk. (Charter 1870, tit. 9, §§ 1, 2, 6.) The action of the Common Council granting permission to the defendant to occupy Water Street, while it involved, as a consequence, the construction of an embankment in Water Street, did not purport to be an exercise of the power to change the grade of the street under the charter. It does not appear that any description was made or recorded as is required when a new grade is established. It would be a strained construction to regard the action of the council as a change of grade of Water Street under the charter provisions. The defendant desired to lay its tracks in Water Street and the other streets mentioned in the grant, and to enable it to do this and cross Commercial Slip an embankment in the street was authorized. The grade of Water Street was not altered, but the defendant was permitted to build an embankment in the street for its railway. The fact that what was done did effect a change in the grade of that part of the street occupied by the embankment does not prove that what was done was in the execution of the power to alter the grade of streets conferred on the council. The primary object of this power contained in municipal charters, is to enable the municipal authorities to render a street more safe and convenient for public travel, to afford drainage, in short, to adapt it more perfectly for the purposes of a public way. It is claimed that the city under this power could lawfully authorize an embankment in part of the street, leaving the other part on a lower level. We are not called upon to say whether there is any limit to the exercise of municipal authority or that the city cannot in exercising the power to establish and alter the grade of streets, raise an embankment in a part of a street if, in its judgment, this will promote the public convenience and the purposes of the street as a highway. But we think it cannot, under the guise of exercising this power, appropriate a part of a street to the exclusive, or practically to the exclusive use of a railroad company, or so as to cut off abutting owners from the use of any part of the street in the accustomed way, without making compensation for the injury sustained. We have held that the authority conferred by the general railroad law upon railroad companies to cross highways in the construction of their lines, authorizes their construction on, over, or below the grade of the highway crossed, and that incidental changes of the grade of the street rendered necessary to accommodate railroad crossings, gives no right of action to abutting owners who may sustain injury. (*Conkling v. N. Y. O. & W. R. R. Co.*, 102 N. Y. 107.) The practice of permitting railroads to cross highways is coeval with the introduction of the railroad system in the State, and the decision comports with the general understanding of the bench and the bar. In case of railroad crossings the highway is left as before. No part of it is taken or exclusively appropriated by the railroad company. In these cases there is no use of the highway for railroad purposes. Railroads of necessity intersect highways, and it is held that the State may permit

them to be crossed by a railroad company and that this involves an invasion of no substantial right of the owner of the fee. We ought not to extend the doctrine of the crossing cases to unreasonable limits, and we think that it cannot be applied to justify the exercise of the public powers attempted in the present case." . . .

GRAY, J. I concur with JUDGE ANDREWS. . . .

"Here the object was to subserve the railroad use, and the appropriation by the defendant of this embankment is practically exclusive. The street was subjected to a new use, with consequences as direct, in the permanent deprivation of the abutting property owners' appurtenant easement, as though the railroad was operated in front of his premises upon a structure physically incapable of other uses. I think we have, in the present case, the element of an appropriation by the defendant of the street by a permanent structure and obstruction, and, hence, it must fall within the spirit, if not the letter, of our decision in the Story case."

All concur, except EARL and FINCH, JJ., dissenting.

Judgment affirmed.

NEWMAN v. THE METROPOLITAN ELEVATED RAILWAY COMPANY.

NEW YORK COURT OF APPEALS. SECOND DIVISION. 1890.

[118 N. Y. 618.]

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made June 18, 1887, which affirmed a judgment in favor of plaintiff entered upon a verdict, and affirmed an order denying a motion for a new trial.

At the commencement of this action the plaintiff held a lease of property situated upon the northwest corner of Church and Rector streets in the city of New York. The lease bore date May 1, 1877, and was for the term of fifteen years, with a right of renewal for an additional term of ten years. Upon the property there was a brick building five stories in height, the first floor of which was used as a restaurant, and the other floors for dwellings.

The Metropolitan Elevated Railway was constructed through Church Street in front of said premises, and in Rector Street there had been erected by the defendants a station from which a covered platform ran to Greenwich Street and there connected with the Ninth Avenue elevated road.

The plaintiff claimed in his complaint that the defendants' structure interfered with the ingress and egress to and from his premises, and also impaired the circulation of light and air from the street to his

egress to and from his premises and also impaired the circulation of light and air from the st. to his

The elevated road was constructed

of a 5' stone brick block

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building, and deprived him of its customary and lawful use, and greatly reduced its value to him as lessee.

It was admitted that the action was brought and tried as one to recover in one sum the whole damage sustained and to be sustained from the depreciation of the plaintiff's estate, on the assumption that the defendants' structure caused a permanent impairment of the easements in the street for light, air, and access.

The court, having charged the jury that "the damages to plaintiff's leasehold was to be measured by the depreciation of rents caused by defendants' structure, in depriving the premises of the accustomed light, air, and egress which it had before said structure was placed thereon," and that in considering the question of damages "the fact that real estate had risen generally in that district of the city did not relieve the railroad company from the element of damage," was requested by the defendants to charge as follows: "That in estimating the damages to the leasehold interest in this plaintiff caused by the interference by the defendants with the light, air, and access appurtenant to the premises, the jury may take into consideration any benefits peculiar to his house which have arisen by the construction of the road as shown by the evidence." To this the court replied: "That I refuse to charge. On the contrary, the jury have no right to take any such fact into consideration."

Instruction should have been granted.
The defendants gave evidence tending to show, and from which the jury might have found, that while the upper parts of the building had been made less desirable for dwellings by reason of the erection of the defendants' structure, and in consequence thereof the rents had fallen, the location of the station in Rector Street had, from the greater number of people resorting there, caused the first or store floor of the building to become more desirable for business purposes, and greatly enhanced in rental value.

Julien T. Davies and W. Bourke Cockran, for appellants. James M. Smith and Inglis Stuart, for respondents.

BROWN, J. The basis of the court's refusal to charge as requested is to be found in the Rapid Transit Act (chap. 606, Laws 1875, § 20) and in the General Railroad Law (chap. 140, Laws 1850, § 16) which, by section 3, chapter 885, Laws of 1872, was made applicable to the Gilbert Elevated Railroad Company to whose rights the Metropolitan Railroad Company succeeded. These laws provide that commissioners of appraisal shall not, in determining the amount of compensation to be made to parties owning or interested in property acquired for the construction and operation of railways formed thereunder, "make any allowance or deduction on account of any real or supposed benefits which the party in interest may derive from the construction of the proposed railroad."

What is the true meaning of this provision and how far it is applicable to a case of the character we are considering, is a question we are to determine upon this appeal.

the railroad co. from the element of damage.
The court refused to instruct them that in estimating the damages the jury might take into consideration any benefits which the party in interest may derive from the construction of the proposed railroad.

for land wh. the R.R. takes and to wh. it acquires

The principle upon which compensation is to be made to the owner of lands taken by proceedings under the General Railroad Law has been frequently considered by the courts of this State, and the rule is now established that such owner is to receive, first, the full value of the land taken, and, second, where a part only of land is taken, a fair and adequate compensation for all injury to the residue sustained or to be sustained by the construction and operation of the railroad. *T. & B. R. R. Co. v. Lee*, 13 Barb. 169; *In re C. & S. V. R. R. Co.*, 56 Barb. 456; *In re P. P. & C. I. R. R. Co.*, 13 Hun, 345; *In re N. Y. C. & H. R. R. Co.*, 15 Hun, 63; *In re N. Y. L. & W. R. Co.*, 29 Hun, 1; *In re N. Y. L. & W. R. Co.*, 49 Hun, 539; *Henderson v. N. Y. C. R. Co.*, 78 N. Y. 423.

The first element in the award represents the compensation for land which the railroad takes, and to which it requires title. The second element represents damages which are the result or consequences of the construction of the road upon property not taken, and which the owner still retains. Such damages are wholly consequential, and to ascertain them necessarily involves an inquiry into the effect of the road upon the property, and a consideration of all the advantages and disadvantages resulting and to result therefrom. The rule is well stated in *Lewis* on Eminent Domain, section 471, as follows: "When part of a tract is taken, just compensation would therefore consist of the value of the part taken, and damages to the remainder, less any special benefits to such remainder by reason of the taking and use of the part for the purpose proposed."

In this rule thus settled in this State, and which controls all awards for taking of land under the General Railroad Act, is to be found the true application of the statutory provision which forbids deductions and allowances to be made by commissioners for any real or supposed benefits, which the parties interested may derive from the construction of the railroad. Whatever land is taken must be paid for by the railroad company at its full market value, and from such value no deduction can be made, although the remainder of the land-owners' property may be largely enhanced in value as a result of the operation of the railroad. But in considering the question of damages to the remainder of the land not taken, the commissioners must consider the effect of the road upon the whole of that remainder, its advantages and disadvantages, benefits and injuries, and if the result is beneficial, there is no damage and nothing can be awarded.

The rule established under the General Railroad Law must govern and control awards made under the Rapid Transit Act. The last-named Act confers upon corporations formed thereunder, the power to acquire property for railroad purposes, and the statutory proceedings prescribed are substantially the same as those under the General Railroad Act and no reason is apparent why the same rule should not apply to proceedings under both Acts.

This court has decided that owners of land abutting upon public

hole of the river. - the advantages and disadvantages, benefits and injuries - must be considered, and if the result is beneficial there is no damage and nothing can be awarded.

streets have easements therein for ingress and egress to and from their premises, and for the free circulation of light and air to their property, which easements are interests in real estate, and constitute property within the meaning of that term as used in the Constitution.

The easement is the property taken by the railroad company. But in estimating its value it is impossible to consider it as a piece of property, separate and distinct from the land to which it is appurtenant, and the right of the property owner to compensation is measured, not by the value of the easement in the street separate from his abutting property, but by the damages which the abutting property sustains as a result or consequence of the loss of the easement.

It follows that in making an award to a party situated as the plaintiff was with reference to the defendants' railroad, there would be no compensation for property taken beyond a nominal sum, and that his right to recover would rest chiefly upon proof of consequential damages.

An estimate of such damages as I have already shown, involves an inquiry into the effect of the railroad upon the whole property, and a consideration of all its advantages and disadvantages. If the rental value of the whole building was shown to have been diminished, there was injury for which plaintiff was entitled to recover, but if the diminished rental value of the upper floors was equal or overcome by increased rental value in the store then there was no injury and no basis for a recovery of substantial damages against the defendants.

While the precise question presented by the exception in this case has not heretofore been decided in this court, it is covered by the decisions under the General Railroad Law which have been cited, and the rule established by those decisions has recently been applied in the second judicial department to the case of an elevated railroad. *In re Brooklyn Elevated R. Co. v. Phillips*, 28 State Reporter, 627. That case was an appeal by property owners from an award of nominal damages in proceedings by an elevated railroad company to condemn an easement in a street. The court said: "The inquiry necessarily takes in the advantages from the railroad when the extent of the injury is to be based upon the diminution of value by reason of its construction. The basis of appraisal must then be the difference in value between the abutting house before the construction of the railroad and afterward."

In *Drucker v. Manhattan R. Co.*, 106 N. Y. 157, this court held admissible evidence offered by the property owner that trade and business had fallen off in the street since the erection of the railroad, and that property was for that reason diminished in value. If such evidence is competent to sustain a recovery it is difficult to see why it is not competent for the railroad company to show that the effect of the road has been to cause an increase in business, and hence an enhancement of the value in abutting property.

The question whether, in awarding damages flowing from the construction of a railroad, its injurious effect upon a part of a residue of a

surp, the benefits conferred on the balance were to be considered. Is this a case strictly where when you come right down to it there was no taking

tract of land could alone be considered, has been expressly decided in Illinois. Page v. Chicago R. R. Co., 70 Ill. 324. That case was an assessment of damages for a right of way across a tract of forty acres of land. Compensation was awarded for the part taken, but the evidence showing that the residue of the tract would be enhanced in value by the construction and operation of the road, no consequential damages were allowed to the land-owner. The owner claimed that a strip of land next to the railroad was lessened in value by the proximity of the road. The constitutional provision in Illinois relating to the taking of property for public use is the same as our own and the statute under which the assessment was made provided that benefits should not be set off against or deducted from compensation. The award was sustained on appeal, the court holding that it was not the damages to a strip lying within a limited number of feet of the road-bed that the jury were required to assess, but the damages, if any, to the entire tract. That the effect of the road upon a part of the tract was not to be considered, but upon the whole tract. "This," the court said, "is not deducting benefits from damages, but it is ascertaining whether there be damages or not." To the same effect is the case of Oregon Central R. R. Co. v. Wait, 3 Oreg. 91. - 1869

The statutes we have considered are founded upon the provision of the Constitution forbidding the taking of private property for public purposes without just compensation. Their purpose is to do exact and equal justice among all citizens of the State, and to award to every one full and fair compensation for all property taken for public use or injured by the erection of public improvements.

The rule established by the courts and prevailing under the General Railroad Law accomplishes in a broad and liberal manner that object.

The meaning of the expression "just compensation" has not been limited to the value of property actually taken, but has been held to include all consequential injuries which the land-owner may sustain by reason of depreciation of value in the residue of the property, by reason of the taking of a part and the construction thereon of the public improvement. This rule affords full indemnity to the property owner, and leaves him in as good condition as he was before the construction of the road. And this is all that any citizen has a right to ask. If the rule which the court held in this case is to govern awards made against railroad companies whose structures are erected in the public streets under public authority, when no land is taken, and the compensation is confined to injuries sustained by abutting property, the companies will be compelled in many instances to pay where no injury has been done, and parties will recover who have sustained no loss. Such a rule has not yet received judicial sanction.

The increase of value resulting from the growth of public improvements, the construction of railroads, and improved means of transit accrues to the public benefit generally, and the general appreciation of property consequent upon such improvements belongs to the property

Const. of Ill. requires compensation for damages as well as taking. not so in N. Y.

The conclusion in this class of cases is the severest criticism on the doctrine of the Story case.

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owner, and the railroad company are not entitled to the consideration of that element in the ascertainment of the compensation it must pay to the abutting proprietor. But the special and peculiar advantages which property receives from the construction and operation of the road, and the location of the stations, are elements which enter largely into the inquiry whether there is injury or not, and the jury must consider them and give to them due weight in their verdict.

Between this rule and the statutory provision quoted there is no conflict. The property owner will in every instance receive the "just compensation" which the Constitution secures to him for his property which is taken or injured by the railroad, and the corporation will be compelled to pay whatever damages result from the erection of their structures and the construction of the road. Our conclusion is that the defendant was entitled to the instruction requested, and the exception to its refusal was well taken. The judgment should be reversed and a new trial granted, with costs to abide the event. All concur; FOLLETT, Ch. J., in result. *Judgment reversed.*¹

¹ And so *Bookman v. N. Y. El. R. R. Co.*, 137 N. Y. 302 (1893). In *Bohm v. The Metrop. Elec'd Ry. Co.*, 129 N. Y. 576 (1892), the plaintiff alleged that the defendants had unlawfully interfered with, trespassed upon, and illegally taken his easements (or some portion thereof) of light, air, and access to his property by the illegal erection and operation of their elevated railway in such avenue. He demanded judgment restraining defendants from further maintaining their structure in front of his premises and compelling them to remove the same. He also asked to recover the amount of his damage already sustained by reason of the maintenance and operation of the road past his premises, and that if defendants were permitted to maintain and operate the road in the future it should only be upon the condition that they should pay plaintiff the amount of the permanent loss he would suffer by reason of such maintenance and operation. In giving judgment for the plaintiff, the court (PECKHAM, J.) said: "Although these are suits in equity, commenced to obtain equitable relief and to prevent the defendants from operating their road unless they pay the plaintiffs the damages they will sustain from the permanent interference by the railroad with their easements of light, air, and access, yet the rules upon which such damages are to be awarded are so far well settled as to enable us to say that those damages are only such as would be given in a proceeding for the condemnation of lands for a railroad use, regard being had to the different characteristics of the property to be taken in these cases."

"The rule was last announced in this court in the recent case of *American Bank Note Company v. New York Elevated R. R. Co.* [129 N. Y. 252], not yet reported. What rule obtains in this State in proceedings to condemn the kind of property which has been taken by the defendants in these cases is now made the subject of inquiry. Generally in taking land the rule may be said to be to pay the full value of the land taken at its market price, and no deductions can be made from that value for any purpose whatever. Then as to the land remaining, the question has been to some extent mooted, whether the company should pay for the injury caused to such land by the mere taking of the other property, or whether, in case the proposed use of the property taken would depreciate the value of that which was not taken, such proposed use could be regarded and the depreciation arising therefrom be awarded as part of the consequential damages suffered from the taking. I think the latter is the true rule. *Henderson v. C. R. R.* 78 N. Y. 423, 433; *Newman v. R. R.* 118 Id. 618; *In re Petition Brooklyn R. R.* 55 Hun, 165, 167. The case of *In re Petition N. Y. Elevated R. R. etc.*, 36 Hun, 427, is cited for the other rule. The question might be of great importance where there was an injury to the remaining land, but if there have been no injury, the inquiry as to the scope of the liability for damages is not material. There is no question made

but that the defendants are liable to pay the full value of any property taken by them subject to no deduction whatever. How the value of the particular kind of property which is here taken shall be arrived at is the main, and indeed the only, question in these cases. Included in this inquiry and growing out of it arises the question, shall any special benefits to the remaining property be regarded, or may what is termed general benefits be also taken into consideration? Before entering on a discussion of these matters I think it proper to say that I should hesitate to admit the correctness of the claim made by defendants, that where private property is taken by a mere business corporation, as for a public use under the granted power of eminent domain, the legislature could provide that such property could be paid for by benefits accruing to the land-owner's adjacent property consequent upon the taking. This is the case in regard to municipal corporations where land is taken for a public street, or other public and municipal purpose, and where the benefits arising to the adjacent lands of the owner whose property is taken, may be set off against the value of the land taken. So in the case of property taken by the State for canal or other public purposes, where the owner of the land taken was frequently paid its value by the benefits received to his adjacent land not taken. The principle underlying these cases is, however, the right of the municipality or State to tax the owners of the land left, in order to pay for the land taken, on the ground that they are specially benefited by the taking, and hence should be specially taxed for the payment of the land. The case of *Gen'l v. City of Brooklyn*, 99 N. Y. 296, is no authority for a contrary view, for I think it supports that which I have suggested. A mere trading or business corporation has no power of taxation, and the State could not delegate such power to it. If such company desire another's property, it must pay a just compensation for it, and that just compensation would not consist in its doing the owner some benefit upon his remaining property. . . .

"The plaintiffs own no land in the street. Their ownership of the land is bounded by the exterior lines of the street itself. Hence when, under legislative and municipal authority, the railroad structure was built, it was supposed by many there was no liability to abutting owners, because no land of theirs was taken, and any damage they sustained was indirect only, and, therefore, *damnum absque injuria*. When the courts acquired possession of the question, and it was seen that abutting land, which before the erection of the road was worth, for instance, ten thousand dollars, might be reduced to a half or a quarter of that sum in value, or even rendered practically worthless by reason of the building of the road, it became necessary to ascertain if there were not some principle of law which could be resorted to in order to render those who wrought such damage liable for their work." It has now been decided that, although the land itself was not taken, yet the abutting owner, by reason of his situation, had a kind of property in the public street for the purpose of giving to such land facilities of light, of air, and of access from such street. These rights of obtaining for the adjacent lands facilities of light, etc., were called easements, and were held to be appurtenant to the land which fronted on the public street. These easements were decided to be property, and protected by the Constitution from being taken without just compensation. It was held that the defendants, by the erection of their structure and the operation of their trains, interfered with the beneficial enjoyment of these easements by the adjacent land-owner, and in law took a portion of them. By this mode of reasoning, the difficulty of regarding the whole damage done to the adjacent owner as consequential only (because none of his property was taken), and, therefore, not collectible from the defendants, was overcome. The interference with these easements became a taking of them *pro tanto*, and their value was to be paid for, and in addition the damage done the remaining and adjoining land by reason of the taking was also to be paid for, and this damage was in reality the one great injury which owners sustained from the building and operation of the defendants' road. For the purpose of permitting such a recovery, the taking of property had to be shown. The cases of *Story*, *Lahr*, *Drucker*, *Abendroth*, and *Kane* (the last of which is reported in 125 N. Y. 164, and in which the others are referred to) finally and completely settled these matters

"It seems to me plain, from this review of the law, that the real injury (if any) suffered by the giving of damages where no property has been taken (but where great injury was suffered) as if property had been taken. Wrong method.

The real injury is accomplished by the case is the owner of a remedy due by the legislature

fered by the land-owner in any particular case, lies in the effect produced upon his abutting land by the wrongful interference of defendants with these easements of light, air, and access to such land. And where they are interfered with, and in legal effect taken to any extent, it is not possible to think of them as of any value in and of themselves separated from the adjoining land, but their value is to be measured by the injury which such taking inflicts upon the land which is left, and to which they were appurtenant.

"This is a consequential damage. It is not the light or the air that is valuable separated from the land adjoining. With regard to the subject under discussion there is and can be no value in a given quantity of air, or space, or light in the public street except as it may be used in connection with and as appurtenant to the abutting land. When a person interferes with such light, air, or access and takes it, he takes nothing which is alone and intrinsically valuable, but only as its loss affects the adjoining land. This loss while purely consequential is, nevertheless, a liability which the person proposing to take the property is bound to discharge. . . .

"The real question to be considered is in truth one of damage to the abutting land. Newman v. Elevated R. Co., 118 N. Y. 618. What facts may be regarded upon such an inquiry has not been finally decided.

"In the case of Newman (*supra*) a portion of the subject, was involved and discussed, and we must recognize the authority of that case upon the question actually therein decided. A reference to the report is necessary in order to learn that fact. . . .

"The so-called Rapid Transit Acts, under which the defendants were organized, provided that the commissioners of appraisal should not in determining the amount of compensation make any allowance or deduction on account of any real or supposed benefits which the party in interest may derive from the construction of the proposed railroad. The case of Newman decides that this provision does not mean that in examining the question whether injury has resulted to the abutting owner's remaining land by reason of the taking of a portion of the easements spoken of, the court cannot regard the fact that so far from injury the land remaining had been specially enhanced in value by reason of the taking. On the contrary, it decides that such fact, of special enhancement in value, is material and may and must be considered upon the question of damage. It is not offsetting injury against benefits. It is discovering whether in reality there has been any injury to the remaining land. To prove that the land has been specially benefited may be proof that it has not been diminished in value. If it would have increased still more in value but for this taking by the road, that difference it must pay because to that extent there would be damage. The Newman case is authority for the proposition that the easements are only of nominal value in and of themselves, and that the result of taking them must be looked for in the effect upon the adjoining land. If instead of loss or injury that land has been specially benefited by the taking by the railroad company, then no damage has been sustained by the land-owner. Although adding nothing to the weight of the authority of the Newman case, I must say that as far as it goes the decision receives my unqualified approval. The remarks of the learned judge in the latter part of the opinion as to general benefits from the growth of the city, etc., were no part of the decision itself and were merely suggestions as to matters not really involved in the case. They raise the question as to how far general benefits to the land may be regarded and also whether assuming them to exist they must have been caused by the railroad company in order to be noticed. I shall add a word or two later on upon that subject. At any rate the case decides that it is a defence to the action to recover damages, if it be proved that in fact the owner's remaining land has been specially benefited by the taking.

"In these cases there is no claim that plaintiffs have received benefits from the taking, which were special and peculiar to their lots and not shared in by the owners of lots generally in the avenue. I confess I have been and am wholly unable to see the least materiality in the distinction between what are termed special and general benefits to the property left, or whether such benefits have been caused by the defendants. Strictly speaking, it is not a question of benefits at all, except that proof of benefits may be one way of showing there has been no injury. The value of the easements taken, we have seen, was merely nominal, and the sole question which remains is,

PIERCE ET AL. v. DREW ET AL.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1883.

[136 Mass. 75.]

BILL in equity against the selectmen of Brookline and the American Rapid Telegraph Company of Massachusetts, to restrain the selectmen from granting to the telegraph company a location for its posts and wires in Brookline. The defendants demurred to the bill for want of equity. At the hearing, before ENDICOTT, J., a decree was entered sustaining the demurrer and dismissing the bill; and the plaintiffs appealed to the full court. The allegations of the bill appear in the opinion.

A. D. Chandler, for the plaintiffs. *F. Morison*, for the defendants.

therefore, has the owner suffered any damage or injury whatever which has been caused by this taking, for if there have been no damage there can be no recovery. To ascertain the fact whether there has been damage, an excursion into the realms of possibilities as to what might have happened but did not, is not permitted. The inquiry whether the land would have been injured if certain circumstances had not occurred which not only prevented such injury, but enhanced its value, is wholly immaterial. The question is, what in fact has been the actual result upon the land remaining? Has its actual market value been decreased by the taking, or has the taking prevented an enhancement in value greater than has actually occurred, and if so, to what extent? The amount of such decrease in the value of the remaining land, or the amount of the difference between its actual market value and what it would have been worth if the railroad had not taken the other property, is the amount of the damage which the defendants should pay. If on the contrary there has been neither decrease in value caused by the railroad, nor any prevention of an increase from the same cause, how can it be truly said that the lot-owner has been injured to the extent of a farthing? The absence of injury may have been the result of the general growth of the city by reason of which the particular property has grown in value with the rest of the city. It is the fact, not the cause, which is material. Where it appears that the property left has actually advanced in value, unless it can be shown that but for the act of defendants in taking these easements it would have grown still more in value, the fact is plain that it has not been damaged.

"It is said the lot-owner himself is entitled to the benefits accruing to him from the general rise of property caused by a general growth of the city in that vicinity, and that the causes of such growth are too indefinite, and uncertain, and problematical to permit the railroad to take advantage of it upon the question of damages. Of course, the lot-owner is entitled to the benefits arising from these sources. I propose to take no course which shall rob him of them. None other ought to or in fact can have them. It is not a question of permitting the lot-owner to have these benefits. How is he despoiled of them when upon an inquiry whether he has sustained damage from the conduct of the defendants it clearly appears that he has not? If it appear that he would have sustained damage but for the fact that the general growth of the city in that direction prevented it and caused an increase in value, what materiality lies in the fact that this growth was not caused by the railroad? As I have already remarked, the fact that there has been no damage, is the material fact, and not the reasons which in truth prevented the injury from occurring. If it did not occur, then clearly the lot-owner has suffered nothing. He receives all the benefits attaching to the general growth of the city which causes the enhancement in value of his own lots, but he is not permitted to recover from defendants alleged damages which, in fact, he has never sustained." — ED.

DEVENS, J. The facts admitted by the demurrer may be thus stated: The plaintiffs own land on a certain street or public highway in Brookline; they also own a fee in the half of the street which is next to their abutting land.

The defendants are the selectmen of Brookline, and, on the application of the American Rapid Telegraph Company, a corporation organized under the St. of 1874, c. 165¹ (Pub. Sts. c. 106, § 14), for the transmission of intelligence by electricity, are about to grant to that company, under the Pub. Sts. c. 109, a location along said highway for their posts, wires, &c. The bill seeks to restrain the defendants, upon the ground that the last-named statute is unconstitutional. . . . [Here follows a recital of the substance of the statute and a determination that the business in question is one of a public nature.]

But as, even if the legislature has the right to authorize the erection of telegraph poles along a highway, as a public use thereof, appropriate safeguards must be provided for any rights of property belonging to individual owners which may be taken or invaded, there remain these inquiries for our consideration: first, whether the statute does provide any compensation to the owner of the fee for this new use of the highway; second, whether he is entitled to such compensation; third, whether the owner of property near to, or abutting upon, the highway, is entitled to any compensation therefor other than such as the Act provides. . . .

As the chapter does not, in our opinion, provide for damages to the owner of the fee in the highway by reason of the erection of the telegraphic posts and apparatus, it is to be determined whether such a use of the highway creates a separate and additional burden, requiring an independent assessment of damages, for which the owner of the land was not compensated when the highway was laid out, and thus whether the omission of the Act to provide for this compensation renders it unconstitutional.

It is to be observed that, for more than thirty years, the right to appropriate highways to this public use, without any compensation to the owners of the fee therein, has been asserted; that the statutes in regard to it have more than once been expounded by this court, without any apparent doubt of their validity; and that, up to the present time, no suggestion has ever been made that the rights of such owners were in any way invaded. If the argument that these owners are entitled to compensation be correct, the estates of thousands have been wrongfully used while they were either ignorant of their rights or submissive to injustice; and in the mean time costly telegraphic structures have been erected, and the whole business of the State has accommodated itself to this system of the transmission of intelligence. After so long a practical construction by the legislature and the courts, and

¹ This statute authorizes any number of persons, not less than three, to form a corporation "for the purpose of carrying on any lawful business," excepting certain kinds of business, not material to be stated.

after so widely extended an acquiescence by parties whose estates or interests therein are directly affected, it would require a clear case to justify us in setting aside such a statute as unconstitutional, even if it be true, as it certainly is, that no usage for any course of years, nor any number of legislative or judicial decisions, will sanction a violation of the fundamental law, clearly expressed or necessarily understood. *Packard v. Richardson*, 17 Mass. 122, 144 ; *Commonwealth v. Parker*, 2 Pick. 549, 557 ; *Holmes v. Hunt*, 122 Mass. 505. No right to take the private property of the owner of the fee in the highway is conferred by this Act ; all that is given is the right to use land, by permission of the municipal authorities, the whole beneficial use of which had been previously taken from the owner and appropriated to the public. It is a temporary privilege only which is conferred ; no right is acquired as against the owner of the fee by its enjoyment, nor is any legal right acquired to the continued enjoyment of the privilege, or any presumption of a grant raised thereby. Pub. Sts. c. 109, § 15. The discontinuance of a highway would annul any permit granted under the statute, and no encumbrance would remain upon the land.

In *Chase v. Sutton Manuf. Co.*, 4 Cush. 152, 167, it is said by Chief Justice Shaw, "that where, under the authority of the Legislature, in virtue of the sovereign power of eminent domain, private property has been taken for a public use, and a full compensation for a perpetual easement in land has been paid to the owner therefor, and afterwards the land is appropriated to a public use of a like kind, as where a turnpike has by law been converted into a common highway, no new claim for compensation can be sustained by the owner of the land over which it passes." The case itself goes further than the illustration used by the Chief Justice. It related to a claim made by an owner in fee of land which had been taken by a canal company by statutory authority, for the purpose of a navigable waterway, which company had been permitted by statute to sell its property to a railway company ; but, although the two modes of transportation were entirely different, the validity of the Act was sustained, and the claim of the land-owner for further compensation disallowed.

"It is well settled," says Mr. Justice Gray, in *Boston v. Richardson*, 13 Allen, 146, 160, "that when land, once duly appropriated to a public use which requires the occupation of its whole surface, is applied by authority of the legislature to another similar public use, no new claim for compensation, unless expressly provided for, can be sustained by the owner of the fee."

When land has been taken or granted for highways, it is so taken or granted for the passing and repassing of travellers thereon, whether on foot or horseback, or with carriages and teams for the transportation and conveyance of passengers and property, and for the transmission of intelligence between the points connected thereby. As every such grant has for its object the procurement of an easement for the public, the incidental powers granted must be so construed as most effectually

to secure to the public the full enjoyment of such easement. *Commonwealth v. Temple*, 14 Gray, 69, 77.

It has never been doubted that, by authority of the legislature, highways might be used for gas or water pipes, intended for the convenience of the citizens, although the gas or water was conducted thereunder by companies formed for the purpose; or for sewers, whose object was not merely the incidental one of cleansing the streets, but also the drainage of private estates, the rights of which to enter therein were subject to public regulations. *Commonwealth v. Lowell Gas Light Co.*, 12 Allen, 75; *Attorney-General v. Metropolitan Railroad*, 125 Mass. 515, 517; *Boston v. Richardson*, *ubi supra*.

Nor can we perceive that these are to be treated as incidental uses, as suggested by the plaintiff, because the pipes are conducted under the surface of the travelled way, rather than above it. The rights of the owner of the fee must be the same in either case, and the use of the land under the way for gas-pipes or sewers would effectually prevent his own use of it for cellarage or similar purposes.

When the land was taken for a highway, that which was taken was not merely the privilege of travelling over it in the then known vehicles, or of using it in the then known methods, for either the conveyance of property or transmission of intelligence. Although the horse railroad was deemed a new invention, it was held that a portion of the road might be set aside for it, and the rights of other travellers, to some extent, limited by those privileges necessary for its use. *Commonwealth v. Temple*, *ubi supra*; *Attorney-General v. Metropolitan Railroad*, *ubi supra*. The discovery of the telegraph developed a new and valuable mode of communicating intelligence. Its use is certainly similar to, if not identical with, that public use of transmitting information for which the highway was originally taken, even if the means adopted are quite different from the post-boy or the mail-coach. It is a newly discovered method of exercising the old public easement, and all appropriate methods must have been deemed to have been paid for when the road was laid out. Under the clause to regulate commerce among the States, conferred on Congress by the Constitution of the United States, although telegraphic communication was unknown when it was adopted, it has been held that it is the right of Congress to prevent the obstruction of telegraphic communication by hostile State legislation, as it has become an indispensable means of intercommunication. *Pensacola Telegraph v. Western Union Telegraph* [96 U. S. 1].

No question arises as to any interference with the old methods of communication, as the statute we are considering, by § 8, guards carefully against this by providing that the telegraphic structures are not to be permitted to incommode the public use of highways or public roads. We are therefore of opinion that the use of a portion of a highway for the public use of companies organized under the laws of the State for the transmission of intelligence by electricity, and subject to the supervision of the local municipal authorities, which has

taken for these convenient uses -- this seems to be the tendency of modern cases. Is it right

to take land for these convenient uses -- this seems to be the tendency of modern cases. Is it right

been permitted by the legislature, is a public use similar to that for which the highway was originally taken, or to which it was originally devoted, and that the owner of the fee is entitled to no further compensation.

There remains the inquiry, whether there is any objection to the statute because it does not provide a sufficient remedy for the owners of property near to or adjoining the way, who may be incidentally injured by the structures which the telegraph companies may have been permitted to erect along the line of the highway and within its limits. Such remedy is given by § 4 as the legislature deemed sufficient. We should not be willing to believe that the land-owner thus injured would be without remedy, if the company failed to pay the damages lawfully assessed under this section, while it still endeavored to maintain its structures; but the only compensation to which such owner is entitled is that which the legislature deems just, when it permits the erection of these structures. The legislature may provide for compensation to the adjoining owners, but without such provision there can be no legal claim to it, as the use of the highway is a lawful one. *Attorney-General v. Metropolitan Railroad, ubi supra.*

The clause in the Declaration of Rights which provides that, "when- ever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor," is confined in its application to property actually taken and appropriated by the government. No construction can be given to it which can extend the benefit of it to the case of one who suffers an indirect or consequential damage or expense by means of the rightful use of property already belonging to the public. *Cal- lender v. Marsh*, 1 Pick. 418, 430.

The majority of the court is therefore satisfied that the demurrer to this bill was properly sustained, and the entry will be,

Decree affirmed.

[CHARLES ALLEN, J., for himself and WILLIAM ALLEN, J., gave a dissenting opinion.]¹

ADAMS v. CHICAGO, BURLINGTON, AND NORTHERN RAILROAD COMPANY.

SUPREME COURT OF MINNESOTA. 1888.

[39 Minn. 286.]

APPEAL by defendant from an order of the District Court for Winona County, refusing a new trial after a trial by START, J., a jury being waived.

¹ Compare *Am. Teleph. & Teleg. Co. v. Pearce*, 71 Md. 535 (1889). — ED. VOL. I. — 72

Learn up
on the su-
face.

Doctrine of
the N.Y.

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case in

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over this — actually going beyond the limit, reaching
in New York. Did the city have the fee here?
Th. thinks so.

Wm. Gale, J. W. Losey, and Young and Lightner, for appellant. Tawney and Randall, for respondent.

GILFILLAN, C. J. Second Street, in the city of Winona, is, and for 30 years has been, a public street, 70 feet wide, running nearly east and west through the city. Plaintiff is the owner of and occupies as his residence a lot abutting on the south side of said street. The defendant, under authority of the Common Council, which authority the city charter empowered the council to give, has constructed and is operating the main line of its railroad, an ordinary commercial railroad, running to and through Winona, upon and along the north half of Second Street, passing in front of plaintiff's lot, no part of the track being laid south of the centre line of the street. Safe and convenient ingress and egress to and from plaintiff's lot are not materially impaired. The injurious consequences to the lot are not due to any improper construction or operation of the road, but are such as result from constructing and operating a railroad along a street in an ordinary and prudent manner. These injurious consequences arise from the engines and trains passing day and night, and throwing steam, smoke, dust, and cinders upon the plaintiff's premises, and into his house, polluting the air with offensive smells, and interfering with the free circulation of light and pure air into and upon his premises, and jarring the ground so as to cause the house and furniture to vibrate; causing physical discomforts and annoyances to plaintiff and his family, and whereby the rental value of his premises is diminished. The court below ordered judgment for the plaintiff for the damage to the rental value up to the commencement of the action, and the defendant appeals.

The principal question involved has never been directly before this court. There have been, however, cases in which the decisions bore incidentally upon it. It is well settled that where there is no taking of, or encroachment on, one's property or property rights by the construction and operating of a railroad, any inconveniences caused by it, as from noises, smoke, cinders, etc., not due to improper construction, or negligence in operating it, furnish no ground of action; as when the railroad is laid wholly on land which the company has acquired by purchase or condemnation, or in which the party has no interest, so that it does no wrong to him in constructing and operating the road, though there may be some inconvenience or damage to him arising from it, if it be such as the general public suffer, he has no legal cause to complain. Railroads are a necessity, and the public, which enjoys the general incidental benefits from them, must endure any general inconveniences necessarily incident to their construction and operation. And if a railroad company even wrongfully obstructs a street abutting on one's premises, not at the part of the street where it so abuts, unless access to his premises is thereby cut off or materially interfered with, any inconvenience that he may suffer therefrom furnishes no ground for a private action, because the wrong done is a public wrong for which the public authorities are the proper parties to seek redress.

See *Shaubut v. St. Paul & Sioux City R. Co.*, 21 Minn. 502; *Rochette v. Chicago, Mil. & St. Paul Ry. Co.*, 32 Minn. 201 (20 N. W. Rep. 140); *Barnum v. Minnesota Transfer Ry. Co.*, 33 Minn. 365 (23 N. W. Rep. 538). But if a railroad, not touching one's premises, obstructs a street abutting on or leading to them, so as to cut off or materially interfere with his only access to them, the inconvenience is deemed to be special, and not one common to the public, and an action lies. *Brakken v. Minn. & St. Louis Ry. Co.*, 29 Minn. 41 (11 N. W. Rep. 124). It is the same where one owns land abutting on a navigable river or lake, and a railroad is laid along between the land and the navigable water. *Brisbine v. St. Paul & Sioux City R. Co.*, 23 Minn. 114; *Union Depot, etc. Co. v. Brunswick*, 31 Minn. 297 (17 N. W. Rep. 626). And also where a strip between the lots and the river has been dedicated to public use as a levee or landing, and a railroad is laid upon it. *Shurmeier v. St. Paul & Pac. R. Co.*, 10 Minn. 59 (82) (88 Am. Dec. 59). Where, however, there is a taking of a part of a tract or lot of land, the diminution in value of the part not taken, caused by the noise of passing trains, and inconvenience and interruption to the use of the part not taken, resulting from the ordinary operation of the road (*County of Blue Earth v. St. Paul & Sioux City R. Co.*, 28 Minn. 503, 11 N. W. Rep. 73); and from increased exposure of buildings already erected to danger of fire from passing trains (*Colvill v. St. Paul & Chicago Ry. Co.*, 19 Minn. 240 (283); *Johnson v. Chicago, B. & N. R. Co.*, 37 Minn. 519, 35 N. W. Rep. 438); and from increased danger of injury to or destruction of the household of the owner, unless the property not taken is equally valuable for some other purpose, — *Curtis v. St. Paul, S. & T. F. R. Co.*, 20 Minn. 19 (28), — are proper elements of the damages to be allowed for the taking.

From these decisions the propositions may be stated: That the right of recovery against a railroad company, when there is no improper construction of or negligence in operating the railroad, for inconveniences caused by noises, smoke, dust, and cinders, does not depend on the fact that such inconveniences exist, if they be such as are common to the public at large, but on the fact that there has been a taking of the parties' property for the purpose of the railroad, accompanied with such inconveniences, or to which they are incident; and, if necessarily caused by the company's proper use of its own property, there can be no recovery because of them. And that, where there is a taking, such inconveniences as are necessarily incident to it, and to the use for which the property is taken, are proper elements of the damages to the party. And this further proposition (fully established and more clearly set forth in many other decisions of this court) that the rule or damage is applied only to a case where part of a distinct tract or lot is taken, in which case the damages only to the part not taken are to be estimated. As to that only are the damages deemed special. As to other distinct tracts or lots of the same owner the inconveniences are generally such as the public suffer.

As the plaintiff does not claim to own the land in the street which the company has taken for its road, but claims only a right or interest in the nature of an easement in it appurtenant to his lot, the question has been raised and discussed, at considerable length, whether, conceding the right or interest he claims, the acts of the defendant constitute a taking, within the constitutional provision prohibiting the taking of private property for public use without just compensation. As that provision is inserted for the protection of the citizen, it ought to have a liberal interpretation, so as to effect its general purpose. All property, whatever its character, comes within its protection. It is hardly necessary to say that any right or interest in land in the nature of an easement is property, as much so as a lien upon it by mortgage, judgment, or under mechanic's lien laws. If a man is deprived of his property for the purpose of any enterprise of public use, it must be a taking, even though the right of which he is deprived is not and cannot be employed in the public use. In the case of a lien on land taken for railroad purposes, the company cannot make any use of the lien. It does not succeed to the ownership of it. It merely displaces it, — destroys it. So, in case of an easement. If A. has, as appurtenant to his lot, an easement for right of way over the adjoining land, and such adjoining land is taken for railroad purposes, the company does not and cannot succeed to the easement. But it may destroy or materially impair it by rendering it impossible for the owner of it to enjoy it to the full extent that he is entitled to. Such destruction or impairment is within the meaning of the word "taken," as used in the Constitution, as fully as is the depriving the owner of the possession and use of his corporeal property.

The main question in the case is, has the owner of a lot abutting on a public street a right or interest in the street opposite his lot, appurtenant to his lot, and independent of his ownership of the soil of the street, and, if so, what is that right or interest? If he has, and the acts of the defendant in constructing and operating its railroad along that part of the street opposite plaintiff's lot prevent or impair his enjoyment of such right or interest, then he has a right to recover.

We find a great many cases in which is stated, in general terms, the proposition that, although the fee of the street be in the State or municipality, the owner of an abutting lot has, as appurtenant to his lot, an interest or easement in the street in front of it, which is entirely distinct from the interest of the public. *Grand Rapids & Ind. R. Co. v. Heisel*, 38 Mich. 62; *Lexington & Ohio R. Co. v. Applegate*, 8 Dana, 289 (33 Am. Dec. 497); *Elizabethtown, etc. R. Co. v. Combs*, 10 Bush, 382; *Haynes v. Thomas*, 7 Ind. 38; *Protzman v. Indianapolis, etc. R. Co.*, 9 Ind. 467 (68 Am. Dec. 650); *Stone v. Fairbury, etc. R. Co.*, 68 Ill. 394; *Tate v. Ohio & Mississippi R. Co.*, 7 Ind. 479; *Lackland v. North Missouri R. Co.*, 31 Mo. 180; *Street Railway v. Cumminsville*, 14 Ohio St. 523; *Railway Co. v. Lawrence*, 38 Ohio

St. 41; *Crawford v. Village of Delaware*, 7 Ohio St. 459; *City of Denver v. Bayer*, 7 Col. 113 (2 Pac. Rep. 6); *Town of Rensselder v. Leopold*, 106 Ind. 29 (5 N. E. Rep. 761). In 38 Mich. 62, 71, the Supreme Court states it thus: "Every lot-owner has a peculiar interest in the adjacent street which neither the local nor the general public can pretend to claim; a private right in the nature of an incorporeal hereditament, legally attached to his contiguous ground; an incidental title to certain facilities and franchises, which is in the nature of property, and which can no more be appropriated against his will than any tangible property of which he may be owner." Although the proposition was apparently stated with care and upon deliberation, it seems to us (and we say it with diffidence, because of the eminent character of that court) that the decision of the case was a departure from the doctrine thus laid down (and the same may be said of several of the cases referred to). For where the railroad was laid upon a part of the street opposite the party's lot, of which part he did not own the fee, it denied his right to recover for damages caused to his lot incidental to a proper operating of the railroad, and limited it to cases where the acts of the company, of omission or commission, amounted to a nuisance. As the lot-owner can recover for a private nuisance, committed by the improper operation of a railroad, even on the company's own land, in which he has no interest (*Baltimore & Potomac R. Co. v. First Baptist Church*, 108 U. S. 317, 2 Sup. Ct. Rep. 719), it would seem as though, if he is in no better plight in respect to the company's acts in the street, his "peculiar interest," distinct from that of the public, in the street, is of very little value. His title to his interest in the street is precarious, if authority from the State or municipality may justify what would without such authority be a private wrong as to him.

None of the cases we have referred to, nor any till we come to what are known as the "Elevated Railway Cases," attempt to define the limits and extent of the right of an abutting lot-owner in the street opposite his lot, where he does not own the fee. That it extends to purposes of ingress and egress to and from his lot is conceded by all. And for this purpose it may extend beyond the part of the street directly in front; for, as we have seen, an action by him will lie for obstructing the street, away from his lot, so as to cut off or materially interfere with his only access to it.

The questions are asked, how does the lot-owner get an easement in the street? . . . It is, however, hardly necessary to inquire how the lot-owner gets his private right in the street; for it is established law that he has a private right, which, as we have stated, all the cases concede extends to the necessity of access. Access to the lot is only one of the direct advantages which the street affords to it. In a city densely peopled and built up, the admission of light and air into buildings is about as important to their proper use and enjoyment as access to them. Light and air are largely got from the open space which the streets afford. What reason can be given for excluding a right to the street for admit-

ting light and air, when the right to it for access is conceded? For mere purposes of access to the lots, a strip 10 or 15 feet wide might be sufficient. Yet everybody knows that a lot fronting on a street 60 or 70 feet wide is more valuable, because of the uses that can be made of it, than though it front on such a narrow strip. Take a case in one of the States where the fee of the streets is in the State or municipality, and of a street 60 feet wide. The abutting lot-owners have paid for the advantages of the street on the basis of that width, either in the enhanced price paid for their lots, or, if the street was established by condemnation, in the taxes they have paid for the land taken. In such a case, if the State or municipality should attempt to cut the street down to a width of 10 or 15 feet, would it be an answer to objections by lot-owners that the diminished width would be sufficient for mere purposes of access to their lots? It would seem as though the question suggests the answer.

The cases known as the "Elevated Railway Cases" (*Story v. N. Y. Elevated R. Co.*, 90 N. Y. 122, and *Lahr v. Metropolitan Elevated R. Co.*, 104 N. Y. 268, 10 N. E. Rep. 528) are notable in several respects: first, because they were the first cases (and it seems strange that they should have been) in which was squarely presented, so as to demand a direct decision, the claim of abutting lots to an easement in the street in their front, for purposes of light and air; second, for the number and ability of the counsel on each side, and the thoroughness with which they discussed every point involved, and presented every argument *pro* and *con* that could be suggested; and, lastly and especially, for the exhaustive character of both the prevailing and dissenting opinions by the members of the court. The latter case was really a re-argument of the questions decided in the earlier, and in its opinion the court not only adhered to, but took pains to define, its earlier decision, and in some respects to go beyond it, and give to the principles determined a wider application than appears to have been given to them in the first case. We think that in those cases the doctrine is unqualifiedly established that no matter how the abutting owner acquires title to his land, and no matter how the street was established, so that the only right of the public is to hold it for public use as a street forever (and the public gets no greater right under a dedication), and no matter who may own the fee, "an abutting owner necessarily enjoys certain advantages from the existence of an open street adjoining his property, which belong to him by reason of its location, and are not enjoyed by the general public, such as the right of free access to his premises, and the free admission and circulation of light and air to and through his property." The doctrine was followed and applied by the Circuit Court of the United States for the Southern District of New York, in *Fifth Nat. Bank v. N. Y. Elevated R. Co.*, 24 Fed. Rep. 114. The general doctrine, we think, stands on sound reason and considerations of practical justice.

The private right in a street is of course subordinate to the public

right. The latter right is for use as a public street, and the incidental right to put and keep it in condition for such use, and for no other purpose. Whatever limitation or abridgment of the advantages which the abutting lot is entitled to from the street may be caused by the exercise of the public right, the owner of the lot must submit to. If putting it to proper street uses causes annoying noises to be made in front of his lot, or the air to be filled with dust and smoke, so as to darken his premises, or pollute the air that passes from the street upon them, he has no legal cause of complaint. His right to complain arises when such interruptions to the enjoyment of his private right are caused by a perversion of the street to uses for which it was not intended; by employing it for uses which the public right does not justify. That constructing and operating an ordinary commercial railroad on a street is a perversion of the street to a use for which it was not intended, one not justified by the public right, and which the State or municipality, as representing such right, cannot, as against private rights, authorize, — the decisions of this court are full and explicit. It has always been held here, contrary to the decisions in many of the States, that laying such a railroad upon a public street or highway is the imposition of an additional servitude upon it, — an appropriation of it to a use for which it was not intended. *Carli v. Stillwater Street Ry., etc. Co.*, 28 Minn. 373 (10 N. W. Rep. 205), and cases cited. Many of the decisions cited to show that upon a state of facts such as exists in this case the lot-owner can have no right of action, were by courts which hold that the use of a street for an ordinary railroad is a legitimate street use, — one that comes within the uses and purposes for which streets are established. Where that is the rule, inasmuch as the right or interest of the abutting lot-owner is subordinate and subject to the right to devote the street to use for a railroad, as well as for any other proper mode of street travel, of course no cause of action in favor of the lot-owner, whether he owns the fee of the street or not, could grow out of the proper construction and operating of a railroad in the street. For that reason the decisions of such courts can be of no authority here, where a different rule upon the rightfulness of using the street for such a purpose prevails.

The conclusions arrived at are that the owner of a lot abutting on a public street has, independent of the fee in the street, as appurtenant to his lot, an easement in the street in front of his lot to the full width of the street, for admission of light and air to his lot, which easement is subordinate only to the public right. That depriving him of or interfering with his enjoyment of the easement for any public use not a proper street use is a taking of his property within the meaning of the Constitution. That appropriating a public street to the construction and operation of an ordinary commercial railroad upon it is not a proper street use. That where, without his consent and without compensation to him, such a railroad is laid and operated along the portion of the street in front of his lot, so as upon that part of the street to cause

smoke, dust, cinders, etc., which darken or pollute the air coming from that part of the street upon his lot, he may recover whatever damages to his lot are caused by so laying and operating such railroad on that part of the street.

That the recovery should be limited to the damages caused by operating the railroad in front of plaintiff's lot, and ought not to include any that might have accrued from operating it on other parts of the street, was undoubtedly the opinion of the court below when it came to make its findings of fact; for it finds as a fact no other damage than the depreciation in the rental value of the lot caused by operating the railroad on the street in front of it. The proof of depreciation in rental value, however, was made in part by admitting proof (against defendant's objection) of the rental value "with the road constructed on that street, and operated there as roads usually are." There was no other evidence of depreciation. The evidence takes into account not merely the consequences to the lot from operating the railroad in front of it, but also from operating the road on the whole or any part of it, however remote from the lot. This would allow plaintiff to recover for such consequences of operating the road as he suffered in common with the public generally, and not merely such as were peculiar to himself. The evidence was erroneously admitted, and, as there was no competent evidence to sustain the finding of the amount of damage, the finding must be set aside. A new trial is therefore ordered of the issue as to the amount of damage (but of no other issue), unless the plaintiff will consent in the court below to take judgment for nominal damages merely.¹

VANDEBURGH, J. (dissenting). If a street or highway is so occupied or encumbered as to occasion special and peculiar injury to an abutting land-owner, an action for damages or an injunction may be sustained. But I do not assent to the proposition that such owner has property interests in the street, beyond the boundary of his land therein (presumptively the centre line thereof), which are the proper subject of condemnation proceedings. The opposite rule, I think, has always been accepted and acted on in this State, and is supported by the great weight of authority. . . .

¹ And so *Lamm v. Chic. &c. Ry. Co.*, 45 Minn. 71, 78 (1890); *Williams v. City Electric St. Ry. Co.*, 41 Fed. Rep. 556 (U. S. C. C. E. D. Ark. 1890). Compare *Nichols v. Ann Arbor, &c. Ry. Co.*, 87 Mich. 361.

In *Garrett v. Lake Roland El. Ry. Co.*, 29 Atl. Rep. 830 (June, 1894), the Maryland Court of Appeals (McSHERRY, J.), in sustaining a decree dismissing the plaintiff's bill, said: "By Section 5 of Ordinance No. 23, approved April 8, 1891, the North Avenue Railway Company (one of the several roads by the consolidation of which the Lake Roland Elevated Railway Company was formed) was authorized to bridge the Northern Central Railway Company's tracks on North Street, by means of an elevated structure, extending, including the necessary approaches thereto, along North Street from the corner of that and Eager streets to the corner of North and Saratoga streets. A stone abutment, forming an inclined plane, to carry on its perpendicular or highest side the iron superstructure, and to serve, on its surface, as the northern approach to the elevated road, has been erected nearly in the centre of North Street between Chase

WESTERN UNION TELEGRAPH COMPANY v. WILLIAMS.

VIRGINIA SUPREME COURT OF APPEALS. 1890.

[86 Va. 696.]

ERROR to judgment of Circuit Court of New Kent County, rendered October 30, 1888, in an action of trespass on the case wherein James K. Williams was plaintiff, and the plaintiff in error, the Western Union Telegraph Company, was defendant. Opinion states the case.

Staples and Munford and Robert Stiles, for the plaintiff in error. *Pollard and Sands, R. T. Lacy, and W. W. Gordon*, for the defendant in error.

LACY, J., delivered the opinion of the court. . . . However, it is claimed by the plaintiff in error that, granting that the rights of the

and Eager, directly in front of part of the first-named lots of Mr. Garrett. It is 83 feet and $2\frac{1}{2}$ inches in length, and $15\frac{8}{10}$ feet in width, and starts at the street grade, and gradually rises to a height of 9 feet, and leaving a distance or driveway between its western face and the curb line, contiguous to Mr. Garrett's property, of 9 feet and $8\frac{1}{4}$ inches. . . . The proposition distinctly presented by the record, and earnestly contended for by the appellant's distinguished counsel, is that the erection by the appellee of this abutment on property not owned by the appellant, but in the bed of a public city thoroughfare, upon which his lots abut, destroys the access to his land, interferes with light and air, imposes a new and additional servitude upon his property, and deprives him of the benefit of the use of the same, and amounts in law to a taking of his property that is in fact not trespassed upon or touched, — is illegal, until compensation shall have been first made therefor. Though there has been no physical invasion of the appellant's property, still, if the act complained of constitutes, by reason of its consequences, a taking of the appellant's private property for a public use, within the meaning of section 40 of article 3 of the Constitution of Maryland, which prohibits the taking of private property for public use, except upon just compensation being first paid or tendered, then the injunction should have been granted. . . . There is some conflict among adjudged cases as to what amounts to such a taking, but the overwhelming weight of authority accords with the conclusions which this court announced in two cases that will be fully referred to later on. Apart from the decisions of the Supreme Court of Ohio (see *Crawford v. Delaware*, 7 Ohio St. 460), which rest upon a doctrine peculiar to that State, and the recent New York decisions in the Elevated Railway Cases (*Story v. Railroad Co.*, 90 N. Y. 122; *Lahr v. Railway Co.*, 104 N. Y. 268), which are hopelessly in conflict with the principles announced in other cases in the same State (*Radcliff v. Mayor, etc.*, 4 N. Y. 195; *Fobes v. Railroad Co.*, 121 N. Y. 505), and the decisions in Minnesota (*Adams v. Railroad Co.*, 39 Minn. 286, 39 N. W. 629; *Lamm v. Railroad Co.*, 47 N. W. 455), and a few cases in Mississippi (*Theobald v. Railway Co.*, 66 Miss. 279), and possibly one or two other States, — all substantially following the New York Elevated Railway Cases, — there is practically an unbroken current of adjudged cases broadly and clearly marking and defining the difference between an incidental injury to, and an actual taking of, private property. . . . We must either adhere to these two decisions in 50 Md. and 74 Md. [*Mayor v. Willison*, 50 Md. 148, and *O'Brien v. R. R. Co.*, 74 Md. 363], strictly in accord, as we have shown them to be, with the decided weight of judicial opinion on this subject, — or else, receding from them, adopt the Ohio or the New York doctrine. We see no reason for departing from, or for modifying, our former deliberate judgments. The Ohio doctrine is peculiar to that State alone (*O'Connor v. Pittsburgh* [18 Pa. St. 187], *Northern Transp. Co. v. Chicago* [99 U. S. 635]), and is so admitted to be in *Crawford v. Delaware*, *supra*. The New York doctrine involves this inextricable dilemma, *viz.*: If the grading of a street by a municipal corporation cuts off all access

plaintiff are what we have stated, and the Commonwealth has only the right to use by going over, still his case is good, because his works are only a use of the easement, and constitute no new taking, — no additional servitude. We will now briefly consider this argument.

The right in the Commonwealth is to use by going along over; this is the extent of the right. If the right was granted to the defendant to go over simply to carry its messages, then the right granted was in existence before the grant, and the right to go over is not only not disputed, but distinctly admitted. This is the servitude over the land fixed upon it by law, and the whole extent of it. > If anything more is taken it is an additional servitude, and is a taking of the property within the meaning of the Constitution. > To take the whole subject, the land in fee, is a taking. This, however, is the meaning of the term only in a limited sense, and in the narrowest sense of the word. The constitutional provision, which declares that property shall not be taken for public use without just compensation, was intended to establish this principle beyond legislative control, and it is not necessary that property should be absolutely taken, in the sense of completely taking, to bring a case within the protection of the Constitution. As was said by a learned justice of the Supreme Court of the United States: "It would be a curious and unsatisfactory result." [Here follows the rest of a paragraph from the opinion of the court (MILLER, J.) in *Pumpelly v. Green Bay Co.*, ante, p. 1062.]

It is obvious, and it is so held in many cases, that the construction of a railroad upon a highway is an additional servitude upon the land, for which the owner is entitled to additional compensation. *Cooley's Constitutional Limitations*, 548; *Ford v. Chicago and Northwestern R. R. Co.*, 14 Wis. 616; *Pomeroy v. Chicago & M. R. R. Co.*, 10 Wis. 640. And the power of the legislature to authorize a railroad to be constructed on a common highway is denied, upon the ground that the original appropriation permitted the taking for the purposes of a common highway, and no other. The principle is the same when the land is taken for any other purpose distinct from the original purpose, and the reasoning in the two cases is applicable to each. In the case of *Imlay v. Union Branch R. R. Co.*, 26 Conn. 255, it is said: "When land is condemned for a special purpose, on the score of public utility, the sequestration is limited to that particular use. Land taken for a highway is not thereby converted into a common. As the property is not

to a person's house, albeit his property is thereby destroyed and rendered valueless, it is not taken, in the constitutional sense; but if a railroad company, in lawfully constructing its road, does precisely the same thing that the city did in grading the street, then the abutter's property is taken, though not physically entered upon at all. . . . The structure is therefore a lawful one. It does not destroy the street, as a street, though it may cause the plaintiff greater inconvenience in gaining access to his lots than he encountered before it was built. But this and the other injuries complained of are purely incidental and consequential, though the appellant [under the statutes and the ordinance] is not without a remedy therefor." . . . [BRYAN, J gave a dissenting opinion.] — ED.

taken, but the use only, the right of the public is limited to the use, the specific use, for which the proprietor has been divested of a complete dominion over his own estate. These are propositions which are no longer open to discussion." *Nicholson v. N. Y. & N. H. R. R. Co.*, 22 Conn. 85; *South Carolina R. R. Co. v. Steiner*, 44 Ga. 546. In the case of a telephone company, the Chancellor, in the case of *Broome v. New York & New Jersey Telephone Co.* (5th Central Rep. 814), held that, in order to justify a telephone company in setting up poles in the highway, it must show that it has acquired the right to do so, either by consent or condemnation from the owner of the soil, saying: "The complainant seeks relief against an invasion of his proprietary right to his land. The defendant, a telephone company, without any leave or license from, or consent by him, but, on the other hand, against his protest and remonstrance, and in disregard of his warning and express prohibition, and without condemnation or any steps to that end, set up its poles upon his land." What has been said is sufficient of itself to establish the right of the complainants to relief: for in order to justify the defendant in setting up the poles, it is necessary for it to show that it has acquired the right to do so, either by consent or condemnation from the owner of the soil. As to these rights of the owner of the soil see American and English Encyclopædia of Law, vol. 9, title "Highways," vii. sec. 2; *Board of Trade Tel. Co. v. Barnett*, 107 Ill. 508; *Southwestern R. R. Co. v. Southern & A. Tel. Co.*, 46 Ga. 43; *Western Union Tel. Co. v. Rich*, 19 Kansas, 517; *Willis v. Erie Tel. &c. Co.*, 34 N. W. Rep. 337.

That the erection of a telegraph line upon a highway is an additional servitude is clear from the authorities. That it is such is equally clear upon principle in the light of the Virginia cases cited above. If the right acquired by the Commonwealth in the condemnation of a highway is only the right to pass along over the highway for the public, then, if the untaken parts of the land are his private property, to dig up the soil is to dig up his soil; to cut down the trees is to cut down his trees; to destroy the fences is to destroy his fences; to erect any structure, to affix any pole or post in and upon his land, is to take possession of his land; and all these interfere with his free and unrestricted use of his property. If the Commonwealth took this without just compensation it would be a violation of the Constitution. The Commonwealth cannot constitutionally grant it to another. . . . We think the instructions of the Circuit Court were clearly right, and there is no error therein. . . .

LEWIS, P., dissenting, said: I take a very different view of the case from that taken in the opinion of the court just read, and as the case is an important one, I will state the reasons for my dissent. I agree that the Act of February 10, 1880, does not provide for additional compensation to the owners of lands abutting on highways along which telegraph lines may be constructed, and therefore that the question in the case is, whether, on that account, the Act is unconstitutional? . . .

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What, then, is the nature and extent of the public easement in land condemned for a highway? The plaintiff contends that it is merely a right of passage, and nothing more; *Bolling v. The Mayor of Petersburg*, 3 Rand. 563, is referred to in support of this position.

That case, which adopts the language of the ancient authorities on the subject, does, indeed, so hold, and when it was decided, the language used was sufficiently comprehensive to cover every then known mode of enjoying the public right. But since that time civilization has advanced; new modes of using the public highways have been discovered, and as the common law adapts itself to the constantly-changing wants and conditions of society, the courts have held, and rightly, I think, that the view contended for by the plaintiff is altogether too narrow and restricted; so that the principle, as now established, is that the highways of a State are not only open and free for travel and traffic, but that, with the assent of the legislature, they may be devoted, under the original appropriation, to such other public uses as are consistent with their use as public thoroughfares. . . .

Much of the confusion in the decisions on the subject of the constitutional power of the legislature over highways is owing, it seems to me, to a failure to discriminate between *the use* for which a highway is appropriated and the modes of using it. Hence, in passing upon such questions, a clear idea of what a highway is ought always to be kept in view. And what is a highway? Perhaps no better definition of it, in the light of reason and the modern decisions, can be given than to say that it is a road or thoroughfare for the use of the general public for the purpose of *inter-communication*, which embraces the right to use the highway, not only for passage, but for the transmission of intelligence. Formerly, as before remarked, the only mode by which intelligence could be transmitted over a highway was by passing over it. But it is not so now. The discovery of the telegraph and the telephone has revolutionized the methods of inter-communication; and I am unable to perceive why, when a message is sent over a telegraph or telephone wire erected on the public highway, the same, or substantially the same, use is not made of the highway as when a message is sent over it by a messenger on foot or on horseback. In the one case, as was well said in the argument at the bar, the message goes with the messenger; in the other, it goes without a messenger,—the only difference being in the mode of sending it. And it hardly seems in keeping with the progressive spirit of the common law, in eulogy of which so much has been justly written, to say that the new method is not admissible, though with the assent of the legislature, because it was not known to Bracton or Blackstone. Said the court, in *Dickerson v. Colgrove*, 100 U. S. 578: “The common law is reason dealing by the light of experience with human affairs.” And what experience had our fathers with electricity, as an element of inter-communication, in 1825, when *Bolling v. Mayor of Petersburg* was decided? None whatever.

That the new method is not inconsistent with the ordinary use of a

highway is, to my mind, obvious. Indeed, it is in aid of it; for it not only furnishes vastly increased facilities of inter-communication, but it tends to the relief of the highway by lessening travel over it. — which in populous cities, and even in the country, is no small consideration. And here it may be remarked that the statute expressly provides that in no case shall a telegraph or telephone erected along a highway obstruct the ordinary use of the highway. Acts 1879–1880, p. 53; Code, secs. 1287–1290. . . . In the argument, a number of authorities were cited to show that it is not competent for the legislature to authorize a telegraph company to construct its line over the right of way of a railroad company, without making just compensation therefor; and this, I take it, no one will deny. The road-bed and right of way of a railroad company — at least in this State — is as much its property as is its rolling-stock, or the money in its treasury, and the one can no more be lawfully taken without just compensation than the other. But that is a very different case from this; for here I have endeavored to show that the plaintiff's property has not been taken; that nothing has been granted but the right to use a public easement, which right, under no circumstances, can last longer than the easement itself.

Fortunately, direct authority is not wanting in support of these views. The precise question has been adjudicated in two well-considered opinions, — one by the Supreme Judicial Court of Massachusetts, in the case of *Pierce v. Drew*, 136 Mass. 75; the other by the Supreme Court of Missouri, in the case of *The Julia Building Ass'n v. The Bell Telephone Co.*, 88 Mo. 258, — in both of which cases it was distinctly held that an additional servitude is not imposed by the erection on a public highway of a telegraph or telephone line, under a statute of the State, and that such statute is not unconstitutional, because it makes no provision for additional compensation to the owners of the fee in the highway. In the first mentioned case, the court, in an able and learned opinion by Mr. Justice Devens, said: “The discovery of the telegraph developed a new and valuable mode of communicating intelligence. Its use is certainly similar to, if not identical with, that public use of transmitting information for which the highway was originally taken, even if the means adopted are quite different from the post-boy or the mail-coach. It is a newly-discovered method of exercising the old public easement, and all appropriate methods must have been deemed to have been paid for when the road was laid out.” And he added that, “under the clause to regulate commerce among the States, conferred on Congress by the Constitution of the United States, although telegraphic communication was unknown when it was adopted, it had been held it is the right of Congress to prevent the obstruction of telegraphic communication by hostile State legislation, as it has become an indispensable means of inter-communication.” Citing *Pensacola Telegraph v. Western Union Telegraph*, 96 U. S. 1. See also *Telegraph Co. v. Texas*, 105 U. S. 460; *Western Union Tel. Co. v. Alabama*, 132 U. S. 472, and cases cited.

In the telephone case, it was said: "If a thousand messages were daily transmitted by means of telephone poles, wires, and other appliances used in telephoning, the street through these means would serve the same purpose, which would otherwise require its use either by footmen, horsemen, or carriages to effectuate the same purpose. In this view of it, the erection of telephone poles and wires for transmission of oral messages, so far from imposing a new and additional servitude, would, to the extent of each message transmitted, relieve the street of a servitude or use by a footman, horseman, or carriage."

In opposition to these views, the case of *Board of Trade Tel. Co. v. Barnett*, 107 Ill. 507, has been cited. That case was disapproved of by both the Massachusetts and Missouri courts, and, I think, with good reason. The case decides that there is no difference in principle between a telegraph and a steam railway in a country highway, so far as the abstract question of servitude is concerned, and that as the railway is an additional servitude, so also is the telegraph. But this reasoning, to my mind, is fallacious. In the nature of things, the use of a highway for operating a steam-railway more or less excludes the ordinary methods of travel, and is attended with other inconveniences besides. But can this be said of the telegraph? In what way does a telegraph erected on the side of a highway in the country interfere with the rights of the abutting owner, or with its use as a public thoroughfare? Does it exclude or obstruct travel? On the contrary, it is obviously much less of an obstruction than travellers on horseback or in vehicles over the road usually are to one another; and as to any increased dangers or annoyances resulting from the use of streets in a city for the stringing of numerous wires, of which much has been said, that is not a direct but an incidental injury, which is a matter for the legislature, and not for the courts, to consider; for nobody doubts that in such cases the legislature may, if it sees fit, require additional compensation to the owners of the fee to be made.

It has never been questioned, so far as I am informed, that the legislature may authorize telegraph wires to be laid beneath the surface of a street, without additional compensation therefor; and if this can be lawfully done, the power to authorize the wires to be put above the surface would seem to be equally clear, the difference being a mere matter of regulation, as to which, as we have seen, the power of the legislature is unqualified. . . . My opinion, therefore, is that the Act in question is constitutional and valid, and that the judgment of the Circuit Court should be reversed.

RICHARDSON, J., concurred with LEWIS, P. *Judgment affirmed.*¹

¹ And so *Stowers v. Postal Tel. Co.*, 68 Miss. 559 (1891). — ED.

HALSEY v. THE RAPID TRANSIT STREET RAILWAY COMPANY.

NEW JERSEY COURT OF CHANCERY. 1890.

[47 N. J. Eq. 380.]

Mr. John R. Emery and Mr. Frederic W. Sterens, for the complainant. Mr. Chandler W. Riker and Mr. Theodore Runyon, for the defendant.

VAN FLEET, V. C. The complainant owns lands abutting on Kinney Street and Belmont Avenue, in the city of Newark. His lands have a frontage on Kinney Street of two hundred and thirty-six feet, and on Belmont Avenue of about one hundred and thirty-three feet. His title extends to the middle of the street. The defendant is a street railway corporation. It was organized under a general statute approved April 6th, 1886, entitled "An Act to provide for the Incorporation of Street Railway Companies and to regulate the same." Rep. Sup. p. 363. The defendant has laid two railroad tracks in Kinney Street, and intends to lay two others in Belmont Avenue. One of those laid in Kinney Street is on that part of the street in which the complainant owns the fee of the land. No claim is made that these tracks were put down without authority of law, or in violation of the complainant's rights. They are unquestionably lawful structures. They were put down by permission of the city authorities and under their supervision. The defendant intends to use electricity as the propelling power of its cars, and for the purpose of applying this force to the motors on its cars, it has, with the permission of the city authorities, erected three iron poles in the centre of Kinney Street and strung wires thereon. The poles stand partly on the complainant's land. The erection of these poles and the use to which the defendant intends to apply them constitutes the only ground on which the complainant rests his right to the relief he asks. The bill describes these three poles as standing one hundred and eleven feet distant from each other, about twenty feet in height, ten inches by six in diameter at the base, set in a guard or frame, in the form of an inverted cup, which at its base is twenty-two inches by eighteen in diameter. . . . The poles were erected without the consent of the complainant and without compensation to him. No compensation is intended to be made. The complainant insists that the erection of the poles imposed a new and additional servitude on his land in the street; in other words, that his land, by the erection of the poles, has been appropriated to a purpose for which the public have no right to use it. . . .

The question on which the decision of the case must turn is this: Has the complainant's land in the street been appropriated to a purpose for which the public have no right to use it? It is of the first

poles and that this was a use of the land which the public had no right to make. I find any use of a street is limited to the exercise of the right of public passage and that the erection of a pole is a use of a street.

1. The defendant has laid two railroad tracks in the street in front of the poles. The poles are erected to sustain the electric wires to the cars. One of the tracks is on that part of the street in which the complainant owns the fee of the land. The poles stand partly on the complainant's land. The erection of these poles and the use to which the defendant intends to apply them constitutes the only ground on which the complainant rests his right to the relief he asks. The bill describes these three poles as standing one hundred and eleven feet distant from each other, about twenty feet in height, ten inches by six in diameter at the base, set in a guard or frame, in the form of an inverted cup, which at its base is twenty-two inches by eighteen in diameter. . . . The poles were erected without the consent of the complainant and without compensation to him. No compensation is intended to be made. The complainant insists that the erection of the poles imposed a new and additional servitude on his land in the street; in other words, that his land, by the erection of the poles, has been appropriated to a purpose for which the public have no right to use it. . . .

importance in discussing this question to keep constantly before the mind the fact that the locus in quo is a public highway, where the public right of free passage, common to all the people, is the primary and superior right. The complainant has a right in the same land. He holds the fee subject to the public easement. But his right is subordinate to that of the public, and so insignificant, when contrasted with that of the public, that it has been declared to be practically without the least beneficial interest. Mr. Justice Depue, in pronouncing the judgment of the Court of Errors and Appeals in *Hoboken Land and Improvement Co. v. Hoboken*, 7 Vr. 540, 581, said: "With respect to land, over which streets have been laid, the ownership for all substantial purposes is in the public. Nothing remains in the original proprietor but the naked fee, which on the assertion of the public right is divested of all beneficial interest." This view was subsequently enforced by the same court in *Sullivan v. North Hudson R. R. Co.*, 22 Vr. 518, 543. Both the nature and extent of the public right are well defined. Lands taken for streets are taken for all time, and if taken upon compensation, compensation is made to the owner once for all. His compensation is awarded on the basis that he is to be deprived perpetually of his land. The lands are acquired for the purpose of providing a means of free passage, common to all the people, and consequently may be rightfully used in any way that will subserve that purpose. By the taking the public acquire a right of free passage over every part of the land, not only by the means in use when the lands were taken, but by such other means as the improvements of the age, and new wants, arising out of an increase in population or an enlargement of business, may render necessary. It is perfectly consistent with the purposes for which streets are acquired that the public authorities should adapt them, in their use, to the improvements and conveniences of the age. *Morris and Essex R. R. Co. v. Newark*, 2 Stock. 352, 357. This is the principle on which it has been held that a street railway, operated by animal power, does not impose a new servitude on the land in the street, but is, on the contrary, a legitimate exercise of the right of public passage. Such use, though it may be a new and improved use, still is just such a use as comes precisely within the purposes for which the public acquired the land. Chancellor Williamson, speaking on this subject in the case last cited, said in substance (p. 558), the authority to use a public highway for the purpose of a railroad, retaining the use of such highway for all ordinary purposes, subject only to the inconvenience of the railroad, is not such a taking of private property from the owner of the fee of the adjacent land as is prohibited by the Constitution. The easement of the highway is in the public, although the fee is technically in the adjacent owner. It is the easement only which is appropriated, and no right of the owner is interfered with. While the street is preserved as a common public highway, the use of it does not belong to the owner of the land abutting on it any more than it does to any other individual of the

the purpose of allowing the road here. Not so in telegraph cases.

Reasoning here would apply essentially to the case

the poles interfered with the use of the highway
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community. The legislature, therefore, does not, by permitting a railroad company to use the highway in common with the public, take away from the land-owner anything that belongs to him. It is not a misappropriation of the way. It is used, in addition to the ordinary mode, in an improved mode for the people to pass and repass. This exposition of the law, so far as it concerns horse railroads, has been approved as correct in all subsequent cases. As I understand the adjudications of this State, this principle must be considered authoritatively established, that any use of a street which is limited to an exercise of the right of public passage, and which is confined to a mere use of the public easement, whether it be by old methods or new, and which does not tend, in any substantial respect, to destroy the street as a means of free passage, common to all the people, is perfectly legitimate. Such use invades no right of the abutting owners; it takes nothing from them which the law reserved to the original proprietor when his land was taken; it is simply a user of a right already fully vested in the public, and consequently, by its exercise, nothing is taken from the abutting owners which can be made the basis of additional compensation.

It is not denied that the railway tracks which the defendant has laid on the complainant's land were placed there by authority of law, nor that the defendant has a legal right to use them in the transportation of passengers, but the complainant's claim is this: that by the erection of the three poles, his land in the street has been appropriated to a use entirely outside of the public easement, and that it follows, as a necessary legal consequence, that such use constitutes a wrongful taking of his property. Stated more briefly, his claim is, that the erection of the poles puts an additional servitude on his land, and attempts to give the public a right in his land which, as yet, has not been acquired, nor paid for. That the poles will, to a trifling extent, obstruct public travel and prevent infinitesimal parts of the street from being used as a means of free passage, is a fact which cannot be denied, but there is nothing in this situation of affairs which entitles the complainant to the aid of a court of equity, unless it is made to appear that the nuisance thus created results in some substantial injury to him, different from that suffered by the public at large, and that the damage which he will sustain in consequence of the nuisance is irreparable in its character. The rule on this subject is settled. // An individual has no right of action, in cases of nuisance created by obstructing a highway, unless he suffers some private, direct, and material damage beyond the public at large, as well as damage otherwise irreparable. // Mere diminution of the value of the property of the party complaining, by the nuisance, without irreparable mischief, will not furnish any foundation for equitable relief. // *Morris and Essex R. R. Co. v. Prudden*, 5 C. E. Gr. 530, 537. . . .

The court might very properly, I think, at this point deny the complainant's application, on the ground that he has shown no such injury

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as entitles him to relief by injunction, but as this course would leave the principal question of the case undecided, it should not, in my judgment, be adopted. The litigants, I think, are entitled to a decision on the question, whether or not the complainant's land in the street has been appropriated, by the erection of the poles, to a use not within the public easement. That is the question which received the principal attention of counsel on the argument, and which has occupied the greater part of the time devoted to the consideration of the case. Dict
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The right of the defendant to use electricity as its motive-power is clear. The defendant was organized under a general statute, authorizing seven or more persons to associate themselves together, by articles in writing, for the purpose of forming a corporation to construct, maintain, and operate a street railway for the transportation of passengers. Rev. Sup. p. 363. The motive-power to be used by corporations formed under this statute is in no way limited or defined; the statute does not say that they shall use animal, mechanical, or chemical power; it says nothing at all on the subject of power; hence, under the general grant of power to maintain and operate a street railway, it would seem to be clear that a corporation formed under this statute takes, by necessary and unavoidable implication, a right to use any force, in the propulsion of its cars, that may be fit and appropriate to that end, and which does not prevent that part of the public which desires to use the street, according to other customary methods, from having the free and safe use thereof. While the rule is elementary that public grants are to be strictly construed, still it is also well established, that where a corporation is authorized, by a general grant, to exercise a franchise or to carry on a business, and the grant contains no words either defining or limiting the powers which the corporation may exercise, it will take, by implication, all such powers as are reasonably necessary to enable it to accomplish the purposes of its creation. I am, therefore, of opinion, that if there was no other legislation on this subject than that just mentioned, and that it was made to appear that electricity could be used for the propulsion of street cars without preventing the free and safe use of the street by other means of transportation, the defendant would, by force of the statute under which it was organized, have a right to use electricity as its motive-power. But there is other legislation on this subject. Just a month prior to the approval of the statute under which the defendant was organized, another statute was passed, which declares that any street railway company in this State may use electric motors as the propelling power of its cars instead of horses; provided, it shall first obtain the consent of the proper municipal authority to use such motors. Rev. Sup. p. 369, § 30. . . .

By the terms of the statute just construed, no street railway corporation can use electricity as its motive-power until it has obtained the consent of the proper municipal authority. The defendant has such consent. It was given by resolution adopted by the common council and approved by the mayor. The complainant contends that

consent cannot be given by resolution, and insists that the municipality, in such a matter, can only act by ordinance. But the rule, according to the adjudged cases, is firmly settled the other way, and may be stated as follows: Where a statute commits the decision of a matter to the common council or other legislative body of a city, and is silent as to the method in which the decision shall be made, it may be made either by resolution or ordinance. Or—to state the rule in another form—where no method is prescribed in which a municipality shall exercise its power, but it is left free to determine the method for itself, it may act either by resolution or ordinance. One method is just as effectual in point of law as the other. *State v. Jersey City*, 3 Dutch. 493; *City of Burlington v. Dennison*, 13 Vr. 165; *Butler v. Passaic*, 15 Vr. 171.

In view of the legislation and the action of the city authorities just discussed, it would seem to be clear, that the right of the defendant to use electricity as its motive-power stands, at least so far as the public are concerned, on a sure foundation. The poles and wires are to be used to apply electricity to the motors on the cars. They form a part of what is called the overhead system. In the present state of the art, they constitute a part of the best, if not the only means, by which electricity can be successfully used for street-car propulsion. The proof on this point is decisive. Thomas A. Edison is perhaps the highest authority on this subject in this country. He says, in an affidavit annexed to the defendant's answer, that the only method of applying electricity for street-car propulsion which, up to the present time, has proved successful, electrically and commercially, is what is known in the art as the overhead system, whereby electricity is supplied to the motors on the cars from wires suspended above the cars. Other electricians say the same thing. The proofs also show, that there are over two hundred electric street railways in the United States either in operation or in course of construction, and that of those in operation nearly all use the overhead system. That, according to the proofs, is the best system, and the one in general use, and the only one which, as yet, has proved successful. The facts just stated are in no way controverted, so, as the proofs now stand, the court is bound to declare, as an established fact, that the poles and wires are, in the present state of the electric art, necessary to the successful operation of the defendant's railway by electricity. The poles and wires are to be used as helps to the public in exercising their right of passage over the street. They form part of the means by which a new power, to be used in the place of animal power, is to be supplied for the propulsion of street cars, and they have been placed in the street to facilitate its use as a public way and thus add to its utility and convenience. The whole matter may be summed up in a single sentence: the poles and wires have been placed in the street to aid the public in exercising their right of free passage over the street. That being so, it seems to me to be clear beyond question, that the poles and wires do not im-

pose a new burden on the land, but must, on the contrary, be regarded, both in law and reason, as legitimate accessories to the use of the land for the very purposes for which it was acquired. They are to be used for the propulsion of street cars, and the right of the public to use the streets by means of street cars, without making compensation to the owners of the naked fee in the street, is now so thoroughly settled as to be no longer open to debate. It would seem then to be entirely certain, that the occupation of the street by the poles and wires takes nothing from the complainant which the law reserved to the original proprietor when the public easement was acquired. This view is in strict accord with the uniform current of judicial opinion on this subject. The question presented here for judgment has already been considered by the Supreme Court of Rhode Island in *Taggart v. Newport Street Railway Co.*, 19 Atl. Rep. 326, and by the Circuit Court of the United States for the eastern district of Arkansas in *Williams v. City Electric Street Railway Co.*, 41 Fed. Rep. 556, and by local courts in Kentucky, Ohio, and Indiana, and in each instance the decision has been that the placing of the poles and wires in the street, for the purpose of propelling street cars by electricity, did not impose a new servitude on the land, nor appropriate the land to a use not within the public easement. The decision in these cases was placed upon this manifestly just principle: that the question, whether a new method of using a street for public travel results in the imposition of an additional burden on the land or not, must be determined by the use which the new method makes of the street, and not by the motive-power which it employs in such use. The use is the test and not the motive-power. And this principle exhibits, in a very clear light, the reason why it has been held that the placing of telegraph and telephone poles in the street imposes an additional servitude on the land. They are not placed in the street to aid the public in exercising their right of free passage, nor to facilitate the use of the street as a public way, but to aid in the transmission of intelligence. Although our public highways have always been used for carrying the mails and for the promotion of other like means of communication, yet the use of them for a like purpose, by means of the telegraph and telephone, differs so essentially, in every material respect, from their general and ordinary uses, that the general current of judicial authority has declared that it was not within the public easement. Massachusetts has, however, by a divided court, held otherwise. *Pierce v. Drew*, 136 Mass. 75. . . .

The poles and wires . . . are designed to facilitate the use of the streets as means of public passage, and thus increase their utility and convenience to the public. But I do not believe it is possible to imagine any condition of facts which would make it lawful to erect a building, to be used as a dwelling, in a public way. Such use of the land would undoubtedly be entirely foreign to the purposes for which it was acquired. There can, however, be no doubt, I think, that erections may be law-

Why are they not more useful to the public?

fully made in the streets of a city for the purpose of lighting them. ^{why?} They must be lighted at night to make their use safe and convenient, and to prevent lawlessness and crime. By the charter of Newark, power is given to its governing body, by express words, to light the streets, parks, and other public places. I have no doubt that in virtue of this power the city has the right to erect poles in the street just where the poles in question are. The poles in question are in fact to be used for the purpose of lighting the street. One of the conditions on which the city gave its consent to the erection of the poles is, that the defendant shall place on every other pole a group of five incandescent lights, of sixteen candle-power each, and furnish such light every night. This use of the poles and wires would, in my judgment, legalize their erection, but this is not their primary use. They were erected primarily and principally to facilitate the use of the street and add to its convenience as a public way, and it is upon this ground that I think it should be declared that their presence in the street invades no right of the complainant.

The averment that the use of electricity by the defendant, as its propelling power, will render the street so extremely dangerous as practically to destroy it as a public way for any other use than that which the defendant may make of it, is not supported by the proofs; on the contrary, I think it is very clearly shown, that an electric current of the volume the defendant will use, may be used with entire safety to everybody.

The complainant's application must be denied, with costs.¹

¹ And so *Patterson Ry. Co. v. Grundy*, 26 Atl. Rep. 788 (N. J. Ch. 1893); *Taggart et al. v. Newp. St. Ry. Co.*, 16 R. I. 668 (1890); *Dean v. Ann Arbor St. Ry. Co.*, 93 Mich. 330 (1892); aff'g *Det. Ry. v. Mills*, 85 Mich. 634 (1891). See *Poles and Wires*, 4 Harv. Law Rev. 245; *Keasbey, Electric Wires in Streets*, cc. vi-xi.; *Randolph, Em. Dom.* s. 403.

In *West Jersey Ry. Co. v. Camden, &c. Ry. Co.*, 29 Atl. Rep. 423, 424 (N. J., June, 1894), the court (McGILL, CHANCELLOR), in dissolving an injunction, said: "The complainant seeks to sustain the injunction it has obtained as a protection against the invasion of its property rights which, under the Constitution, cannot be appropriated by the street railway without authority of law, and upon compensation. The rights which it deems to be threatened arise from its status, — first, as the owner of the fee of land occupied by Cooper Street; and, second, as the owner of a steam railroad authorized to cross that street. The ownership of the fee in the soil in the public street is subordinate to the public use thereof for the purposes of a highway. That use is an easement of passage by every one over the highway, and every part of it, by any means which will not substantially and permanently exclude any one from the enjoyment of that common right. The means by which such use is to be lawfully had cannot be particularly defined, because, as suggested by Vice-Chancellor Van Fleet, in *Halsey v. Railway Co.*, 47 N. J. Eq. 380, 20 Atl. 859. they will be as numerous as the improvements of the age and new wants, arising out of an increase in population or an enlargement of business may render necessary. It has been repeatedly declared by the courts of this State that the use of the public easement of a highway by a horse railway is a lawful servitude, and therefore is not a new burden of the soil for which compensation must be made to the owner, the reason being that it is a convenient and beneficial means of passage to the public which does not prevent the accustomed use of the highway by

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others. On the contrary, it so accommodates and facilitates that use that it more than compensates for the slight inconvenience that its rails and the necessity of permitting it to have the right of way over ordinary vehicles occasion. It is a means of use which stands in marked distinction from the steam railway (though the difference is only in degree), whose raised rails, noise, speed, and accompanying danger have led the courts to declare it to be incompatible with the common use of the highway, and therefore an additional servitude, for which the owner of the soil must be compensated. *Citizens' Coach Co. v. Camden Horse R. Co.*, 33 N. J. Eq. 267. The electric street railway, as now ordinarily in use, by cars patterned in style and size after the horse railway car, stands, as a means of using the highway, in degree, between the horse and the steam railways. As in case of the horse railway, its rails do not materially interfere with the ordinary use of the highway. While its motive-power, as usually applied, exceeds in capacity that of the horse railway, and the noise and danger attending its operation are greater, they do not extend to the power, noise, and danger of the steam locomotive, with its attendant train of cars. Its capacity for speed is great, but that is subject to municipal control. I do not now deal with the future possibilities of the electric railway. It may readily be conceived that the greater motive-power it possesses may some time induce an attempt to use the highways by trains of cars, or by rails and cars of such character and size as to practically work all evils of the steam railway, and that there will be inaugurated systems of through cars, in furtherance of rapid transit between distant points, which will crowd and burden the street to the inconvenience and obstruction of its other uses, without any accommodation to the ordinary local use of the street, and thus the degree of incompatibility with the common use may be so raised that the courts will be obliged to distinguish between methods of use, and declare against some as creating an additional servitude of the land occupied by the highway, the crucial test for that distinction being whether the use contemplated is compatible with the purpose for which the common highway was originally designed. But such use is not at present the normal operation of the electric street railway, and it is not claimed that any such abnormal conditions exist in the case under consideration.

"Basing their conclusions upon the contemplation of the customary use of the electric street railway, the courts have regarded that, as operated by the trolley system, it is not an additional burden upon the soil in the common highway. *Halsey v. Railway Co.*, *supra*; *Taggart v. Railway Co.*, 16 R. I. 668, 19 Atl. 326; *Railway Co. v. Mills*, 85 Mich. 624, 48 N. W. 1007; *Lockhart v. Railway Co.*, 139 Pa. St. 419, 21 Atl. 26; *Hudson River Tel. Co. v. Watervliet Turnpike and Ry. Co.*, 135 N. Y. 393, 407, 32 N. E. 148; *Railway Co. v. Winslow*, 3 Ohio Cir. Ct. R. 425. The first cited of these cases is the utterance of this court. But it is a work of supererogation at this time to treat this question as more than an unsettled and doubtful one. It is at least that. The present application is to dissolve a preliminary injunction which will not be suffered to stand in the protection of the complainant from a use of the street by the defendant which may or may not invade its property rights. Unless the invasion be clear, the injunction must be dissolved. *Citizens' Coach Co. v. Camden Horse R. Co.*, *supra*; *Hagerty v. Lee*, 45 N. J. Eq. 255, 17 Atl. 826.

"But it is urged that the poles, planted within the curb lines of the sidewalk to support the overhead wires, are at least an invasion of private property. The sidewalks are parts of the highway, subject to the public easement. They are set apart principally for use by pedestrians. They are defined by the curb lines beyond which vehicles may not go, and at which, experience has taught, lamp, hitching, and awning posts, shade trees, and the like, may be planted without inconvenience either to pedestrians or vehicles. At that place the lamp-post, which provides a means to light the highway and thus facilitate its use, has not been regarded as an additional burden upon the soil, and, upon similar consideration, it becomes difficult to perceive why the poles which accommodate a convenient use of the highway by a street railway are to be regarded differently. It is to be remembered, however, that the abutting land-owner ordinarily has something more of property than the ownership of the mere fee of the soil in the sidewalk. By the laws and usages of the State the sidewalk has in a degree been regarded as an appendage to and a part of the premises abutting upon it, and as so essential to the beneficial use of such premises that its improvement is prop-

STREET RAILWAY COMPANY v. DOYLE.

SUPREME COURT OF TENNESSEE. 1890.

[88 Tenn. 747.]

APPEAL in error from Circuit Court of Shelby County, L. H. ESTES, J. *Turley & Wright* and *Myers & Sneed*, for Street Railway Company. *F. P. Edmonson* and *J. P. Houston*, for Doyle.

CALDWELL, J. Action of Doyle, an abutting lot-owner, to recover damages from the East End Street Railway Company for the alleged wrongful and unlawful construction and operation of its railway line along and upon the highway in front of his property. Verdict and judgment for plaintiff, and appeal in error by defendant.

On the trial below the defendant requested the trial judge to instruct the jury as follows: "If the jury find that the defendant constructed its road through a part of the city to a point five miles into the country, in accordance with its contract with the city and county, road [its cars] being propelled by a steam motor, and used only for carrying passengers, stopping at street crossings to take on passengers, then the court charges you that its construction is not an additional servitude upon the streets or public roads from that contemplated in the dedication."

The court refused to give this instruction, and his action in that behalf is assigned as error.

This presents the question reserved in the Smith case (3 Pickle, 633), namely: Whether a railway, whose cars are propelled by "a dummy steam-engine," and used for passengers only, is a burden or servitude on the public street or highway in addition to that contemplated in the original dedication of the land to public use. The reser-

erly imposed upon the owner of the abutting land. *Halsey v. Railway Co.*, *supra*; *State v. Mayor*, &c., 37 N. J. Law, 415; *Weller v. McCormick*, 47 N. J. Law, 397, 1 Atl. 516. It follows that if such improvement of the sidewalk, or constructions under it, which the land-owner shall lawfully make in pursuance of his duty to the public, or for his own private convenience, be expensive in character, so that substantial damage will result to him from the planting of the trolley poles, a serious question will arise whether there will not be a taking of his property for which he must be compensated, and a threatened invasion sufficiently serious to induce this court's interference. But that question is not presented in this case. It does not appear that the complainant has improved the sidewalk in front of its property so that the planting of the poles will substantially or seriously damage such improvement, or, indeed, that it has improved them at all. Another consideration borne in mind is that the abutting property owner has the right of ingress to and egress from his property by means of the street in a manner which will accord with the lawful purposes to which he devotes his property, and also to a reasonably available way through the highway to the several stories of his building in cases of emergencies, like fire. He also has the right to light and air from the highway. And he cannot be deprived of either of these rights by the placing of poles or erection of wires without compensation being made to him. *Railway Co. v. Grundy*, 51 N. J. Eq. 213, 223, 26 Atl. 788. No question touching these rights is presented at this time." — ED.

Here that a railway whose cars are propelled by a dummy steam engine and used for passengers only is a burden or servitude on the public street or highway in addition to that contemplated in the original dedication of the land to public use. Compensation must be given to the abutting owner the fee of the street. In Tennessee an ordinary street railway operated by steam is not, while a steam commercial railway is, an additional servitude on the fee of the highway.

vation was made in that case because the plaintiff therein did not own the ultimate fee in the street, and was not, therefore, in an attitude to be affected by a decision of the question. For reasons stated in that case and in the Bingham case, to be hereafter cited, an abutting landowner, whose line is the side and not the centre of the public highway, is not entitled to compensation for the imposition of an additional burden on the ultimate fee. Not owning the fee, he can justly claim no compensation for its impairment by a new burden imposed upon it. That is a matter for the owner of the estate, out of which the public easement was originally carved, and not for the abutting owner, whose title-papers take him only to the side of the highway, as was true in the Bingham and Smith cases.

In the present case the plaintiff's line is in the centre of the highway, and to that line he owns the ultimate fee; that is, he has such ownership of the soil that he may resume absolute possession and dominion of it to the centre of the highway whenever the original use for which the highway was set apart shall be finally abandoned.

The appropriation vested the public with only such part of his fee-simple estate as was necessary to the full enjoyment of the use then in contemplation. Consequently anything which diverts the highway from that use, or applies it to another or different use, is the imposition of an additional burden on the reserved estate of the owner, and constitutes a taking of his property, for which he may demand and recover just compensation.

So, then, the proposition contained in the request for special instruction is a material one in this case, and should have been given or refused, as it may be sound or unsound in law.

It is well settled that an ordinary steam or commercial railway is, and that an ordinary street railway, operated with horses, is not an additional servitude on the ultimate fee in the public street or highway, the former being a new and different use, while the latter is but an improved and consistent mode of enjoying the original or ordinary use. *Bingham v. Railroad*, 3 Pickle, 522; *Smith v. Street Railroad*, Ib., 633, and authorities cited.

The distinction between the use by the commercial railway and that by the horse railway is so wide and plain that it needs no further comment or illustration.

Confessedly, the railway involved in this case is on the line between the two — the equivalent of neither, but partaking largely of the nature of both. Like those upon the commercial railway, its cars are propelled by a steam-engine, with its unavoidable smoke, noise, and vibration, though in a less degree; and, like the horse-car line, it transports passengers only, stopping at short intervals upon the highway to take them on and let them off, while the commercial railway carries both passengers and other freight, receiving and discharging them at regular depots farther apart.

The size, weight, and speed of appellant's trains (consisting usually

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of a small "boxed" engine and two coaches) are much less than those of the commercial railway trains; but, at the same time, its trains are much larger, heavier, and more rapid in transit than the ordinary horse-car. Alike, the commercial railway and that operated by the appellant are obvious hindrances to other modes of travel and traffic rightfully enjoyed upon the public highway; alike, they endanger the lives and property of individuals, for whom, in the aggregate, the original dedication or condemnation was made. There is a difference, it is true; but the difference is in the degree and not in the kind of interruption and peril.

From the very nature of the case it is perfectly manifest to our minds that the presence of appellant's track and trains is entirely inconsistent with, and a perpetual embarrassment to, the ordinary use of the public highway.

It is utterly impossible to operate such a railway with such trains without greatly obstructing and rendering more dangerous other business and travel usually seen and always allowable on a public highway.

To the extent of this obstruction and this increase of danger by its appropriation of the highway for its own purposes, there is necessarily a diversion from and inconsistency with the original use; and to that extent the construction and operation of appellant's road is the imposition of an additional servitude upon the ultimate fee of the owners of the soil in the public highway.

This does not mean that the trains of appellant are to be banished as unauthorized by law, but simply that their presence and operation in the public highway is an additional burden on the ultimate fee, for which the owner is entitled to compensation.

The charter from the State and contract with the city and county authorize the proper construction and use of this railway, but they do not purport to warrant the appropriation of the owner's property without paying him therefor. Even if such were their purport and intent, that could not alter the case, and would afford no sufficient answer to the plaintiff's demand, because the Constitution forbids the taking of private property for public use without just compensation. Constitution, Art. I., Sec. 21.

The instruction requested was properly refused.

Counsel for appellant have called our attention to the case of *Newell v. Minn. L. & M. Ry. Co.*, 35 Minn. 112 (s. c. 27 N. W. R. 839), which we find to be an authority for the proposition requested, and in conflict with the conclusion reached in this opinion. Not agreeing to the reasoning of that case, and the decision of a sister State being at most only persuasive authority, we prefer not to follow it.

We have carefully considered the several other assignments of error. None of them are well taken.

Let the judgment be affirmed.¹

¹ Compare *McQuaid v. Portl., &c. Ry. Co.*, 18 Oreg. 237 (1889). — Ed.

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In *Sterling's Appeal*, 111 Pa. 35, 40 (1885), where a Natural Gas Company was proposing to lay its pipes under a country highway in front of the appellant's land, the court (STERRETT, J.) said: "As owner of the land traversed by the public road, he has a right to use it and the land on which it is located for any purpose that will not impede or interfere with the public travel. By appropriating land for the specific purpose of a common highway, the public acquires a mere right of passage with the powers and privileges incident to such right. The fee still remains in the land-owner notwithstanding the public have acquired a right to the free and uninterrupted use of the road for the purpose of passing and re-passing; and he may use the land for his own purposes in any way that is not inconsistent with the public easement. He may, for example, construct underneath the surface passage-ways for water and other purposes, or appropriate the subjacent soil and minerals if any, to any use he pleases, provided he does not interfere with the rights of the public. In other words, the only servitude imposed on the land is the right of the public to construct and maintain thereon a safe and convenient roadway, which shall at all times be free and open for public use as a highway. It is in view of this servitude that damages may be awarded to the land-owner. Laying and maintaining a pipe line, at the ordinary depth under the surface, necessarily imposes an additional burden on the land, not contemplated either by the owner or by the public authorities, when the land was appropriated for the purpose of a public road. It is a burden, moreover, which to some extent, at least, abridges the rights of the land-owner in the soil traversed by the road, and hence it is a taking within the meaning of the constitutional provision requiring just compensation to be made for property taken, injured, or destroyed. (Const. Art. XVI., sect. 8.) In some cases it is possible the injury may be consequential as well as direct. The constitutional provision embraces both.

"In *Bloomfield & Rochester Natural Gas Light Co. v. Calkins*, 62 N. Y. 386, it was held that a corporation organized under an Act, similar to ours, authorizing the formation of gas-light companies, has no authority to lay its pipes in a country highway without the consent of or without the appraisal and payment of compensation to the owner of the land. There is no reason why this should not be the rule with respect to public roads in the rural districts. As to streets and alleys in cities and boroughs, there are reasons why a different rule to some extent should prevail; but that question is not now before us."

The owner is entitled to compensation.
 #. Query: If a man owned simply the fee of the road and not any of the adjoining land, would he be entitled to compensation?

MCDEVITT v. PEOPLE'S NATURAL GAS COMPANY.

SUPREME COURT OF PENNSYLVANIA. 1894.

[28 *Atl. Rep.* 948.]

APPEAL from Court of Common Pleas, Alleghany County. . . .

S. Schoyer, Jr., and *W. S. Miller*, for appellants. *Geo. C. Wilson* and *F. M. Magee*, for the appellee.

WILLIAMS, J. The People's Natural Gas Company was incorporated under the Act of 1885 (P. L. 29), known as the "Natural Gas Act," for the purpose of supplying natural gas to the citizens of Pittsburgh for use as fuel. The city had given its permission to the company to occupy the streets with its mains and service pipes, and had undertaken to impose certain modes and restrictions upon it, in the manner of conducting its business, that have since been held to be unauthorized by law, and therefore without force or effect. *Pittsburgh's Appeal*, 115 Pa. St. 4, 7 *Atl.* 778. Pending the litigation over this subject the company began laying its mains into the city, and in July, 1886, entered upon Forbes Street, in the city, for that purpose. The appellees, who are the owners of lots on said street, then began proceedings by bill in equity to restrain the company from laying its gas main under the sidewalk in front of their premises on Forbes Street. Relief was asked on two grounds: First, because the ordinances of the city of Pittsburgh had not been complied with by the company; second, because the sidewalks along the sides of the cartways were not within the meaning of the Act of 1885, and were no part of the highways, but were private property, except for the purposes of passage by pedestrians. A preliminary injunction was granted, which was afterwards dissolved on condition that the company should execute a bond to indemnify the plaintiffs in that case for any loss they might sustain by reason of the laying of said main under the sidewalk in front of their premises. The bond was given, and the gas main laid. The plaintiffs then made application for the appointment of viewers to appraise the damages done to their property by the laying of the main under the sidewalk. Viewers were appointed, and an appraisal of the damages was made by them, which was appealed from. On a trial before a jury a verdict has been rendered against the company for a few cents less than \$5,500, and the judgment entered thereon is now before us for review. . . .

We are in a position, therefore, to enter unembarrassed upon a consideration of the subject brought to our attention by the first assignment of error. The Act of 1885 confers the right of eminent domain on companies formed for the transportation of natural gas. In the exercise of this right, they may enter upon private property, or upon public streets or highways. If the entry is upon private property, the company must try "to agree with the owner as to the damage properly

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payable for an easement in his or her property, if such owner can be found and is *sui juris*." Failing to agree with the owner, the corporation must tender him a bond to secure the payment of damages, and, if this is refused, must apply to the Court of Common Pleas of the proper county to approve the sufficiency of the bond. After this has been done, viewers may be appointed by the court to assess the damages proper to be paid to the property-owner "for the easement appropriated by the company." If the entry is upon a public street in a borough or city, the corporation must first procure the consent of the municipality, expressed "by ordinance duly passed and approved." So long as the gas main follows the street, the entry upon and occupation of the street is under the authority of the municipality. Whenever it leaves the street, and enters the private property of an individual, then the duty to negotiate with the owner arises, since entry upon and occupation of private property must be under authority derived from the owner. Forbes Street was a city highway, and subject, like all other streets in a city, to urban servitudes¹ for the benefit of the public. In land taken for a highway in the country, the easement acquired by the public is only for the purposes of a way over the surface. For all other purposes the land may be occupied by the owner, so long as the public easement is not disturbed. We accordingly held in *Sterling's Appeal*, 111 Pa. St. 35, 2 Atl. 106, that the maintenance of a pipe line under such a highway imposed an additional servitude upon the land. It may be a very slight one, but to some extent it abridges the rights of the land-owner in the soil. Our Brother STERRETT said in that case: "As to streets and alleys in cities and boroughs, there are reasons why a different rule, to some extent, should prevail." These reasons are obvious. The necessity for drainage, for a water supply, for gas for purposes of lighting, for natural or fuel gas for heat, for subways for telegraph and other wires, and for other urban necessities or conveniences, gives to the municipality a control over the subsurface that the township has not. Property in a city is no less sacred than property in the country. The title of the owner is neither better nor worse because of the location of his land. But its situation may subject it to a greater servitude in favor of the public in a large, compactly built city than would be imposed upon it in the open country. The city has the right to use the streets and alleys, to whatever depth below the surface it may be desirable to go, for sewers, gas and water mains, and any other urban uses. In taking the streets for these necessary or desirable purposes, it is acting, not for its own profit, but for the public good. It is the

¹ This phrase suggests, but has no real relation to the like expression in the Roman law. "The leading division of praedial servitudes in the civil law, but which appears to afford no practically useful distinction in the English law, is into urban and rustic servitudes, — the former including all servitudes relating to buildings wherever situated; the latter, all those relating to land uncovered by buildings, whether situated in town or country." — *Gale on Easements* (6th ed.), 22. Hunter, *Roman Law* (2d ed.), 415, 419, gives the right of *aquæ ductus* as a rural servitude, and the right of passing a sewer through or below another's ground, as an urban servitude. — Ed.

representative of the inhabitants of the city, considering their health, their family comfort, and their business needs; and every lot-owner shares in the benefits which such an appropriation of the streets and alleys confers. If the city abridges his control over the soil in and under the streets, it compensates him by making him a sharer in the public advantages that result from proper drainage, from an abundant water supply, from the general distribution of gas, and the like. The disturbance of the owner's control over the subsurface of the streets is, in a legal sense, an invasion of his rights, but it is *damnum absque injuria*. He has no right of action against the municipality therefor. Dill. Mun. Corp. §§ 691, 699; Ang. Highw. §§ 25, 312; Elliott, Roads & S. 299; *Lockhart v. Railway Co.*, 139 Pa. St. 123, 21 Atl. 26; *Sterling's Appeal*, *supra*. The use of the surface is not restricted to the modes of travel in common use when the street is opened, but such improved methods of travel as the public interest requires may be adopted, with the consent of municipality. In *Rafferty v. Traction Co.*, 147 Pa. St. 579, 23 Atl. 884, we held that the operation of a street railway on a public street, when authorized by law, does not impose an additional servitude on the land, whether the railway company employs horses as motive power, or a cable, or electricity. It is a legitimate use of the surface in aid of the public right of passage over the streets. The Act of 1885 declares the transportation and supply of natural gas to be a public use, confers upon the corporations organized under its provisions the right of eminent domain, and requires them to furnish natural gas to consumers along their lines, or within the districts supplied by them, respectively. The appellant was organized under the Act of 1885. It came to the city of Pittsburgh proposing to furnish its citizens with natural gas as a fuel. The city was then to judge whether such fuel was desirable, and whether its introduction would be a convenience to its citizens so great as to justify the occupancy of the public streets by its mains and service pipes. This question was decided in favor of the company, and permission was given to use the streets of the city as a means of reaching customers. Under this permission, it might lawfully enter upon the streets, as we have already seen, to lay its pipes, without liability to lot-owners therefor.

But it is contended that the sidewalks are not a part of the street, and that, in laying its pipes under the sidewalk, the gas company has entered private property by virtue of its power of eminent domain, and must treat with the owner for the damages it may have done. This contention cannot be sustained. The Act of 1847 gives to cities the power "to cause to be graded, paved or macadamized any public street, lane or alley or parts thereof which is now or may hereafter be laid out and opened in any of the said cities . . . and to regulate, grade, pave and re-pave, curb and re-curb, the said footways and sidewalks," and to make regulations concerning the deposit of lumber, building material, or other articles "on any of the said footways, sidewalks or other portions of the said streets or alleys." The street includes the whole of

the land laid out for public use as a highway. The city determines how much of it shall be devoted to a cartway, and how much to a footway, and regulates the grading and paving of both. The separation of one from the other by a line of curbing is for the security of that part of the public that passes along the streets on foot, and for no other purpose. The municipality has the same control over the sidewalks that it has over the carriageways. *Livingston v. Wolf*, 136 Pa. St. 533, 20 Atl. 551. The learned judge of the court below took the same view of this question, and affirmed the defendant's first point, which asked an instruction that the "defendants have the same right in the sidewalks as they would have in that portion of the street lying between the curbstones." The situation of the defendant under this ruling was precisely the same as it would have been had the gas main been laid under the cartway.

The defendant's second point asked the court to say that the lot-owners on Forbes Street had no rights in the street except such as were subservient to the public use, under the direction or sanction of the city, and that as the defendant's gas-main was laid for a public use, under the authority of the Act of 1885, and with the consent of the municipal government, the lot-owners along Forbes Street were not entitled to recover damages for the use of the street. This point the learned judge refused. The logical result of this ruling is to put the rights of the lot-owner in the street in front of his premises above the rights of the public represented by the municipality. In other words, it puts the urban servitudes in a subservient position, and makes the imposition of each of them upon a city street an additional servitude upon the land of the adjoining lot-owner, for which he has a right of action. This is not the law in this State, as is shown by the authorities already cited. As applicable to a country highway, it would be quite right, for under the general road laws the public easement in such a highway is for passage over the surface only. { Land taken for a street in a city is subjected to a very different easement, because of the sanitary and business needs of a city; and the extent of the easement depends upon the municipal judgment as to the extent of occupancy necessary to subserve the health, the comfort, and convenience of the citizens. Elevated structures that interfere with the passage of light and air stand on different ground. } *Jones v. Railroad Co.*, 151 Pa. St. 30, 25 Atl. 134. In this case no entry was made upon the close of the plaintiffs. The pipe is buried in the street, at a depth of four feet under the surface. Access to the plaintiff's property has not been affected. There is no physical change made in it, or in the street on which it fronts. If the lots are affected in value, it is as a consequence of the proximity of the gas line, and not because of anything done to or upon them. Their remedy, under such circumstances, is by action, or upon the bond given to secure them against loss by reason of the dissolution of the injunction. It is not by the appointment of viewers, and the proceeding provided by the Act of 1885 for the assessment

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of damages done by an entry upon private property under the right of eminent domain. The 1st assignment of error is sustained; also, the 4th, 5th, 7th, 8th, and 9th assignments.

*The judgment is reversed, and the order appointing viewers is set aside.*¹

MARCHANT v. PENNSYLVANIA RAILROAD CO.

SUPREME COURT OF PENNSYLVANIA. 1894.

[14 Sup. Court Rep. 894.]

M. Hampton Todd, for plaintiff in error. *A. H. Wintersteen*, and *Wayne MacVeagh*, for defendant in error.

MR. JUSTICE SHIRAS, after stating the facts in the foregoing language,² delivered the opinion of the court.

The Pennsylvania Railroad Company, a corporation under the laws of the State of Pennsylvania, and invested with the privilege of taking private property for its corporate use, erected in May, 1881, and has since maintained, a viaduct or elevated roadway and railroad thereon along the south side of Filbert Street in the city of Philadelphia. On the opposite or north side of Filbert Street the plaintiff below was the owner of a lot or parcel of land, whereon was erected a large four-story building, at that time occupied as a dwelling and business house. The elevated railway did not occupy any portion of the plaintiff's land, nor did it trench upon Filbert Street where it extends in front of the plaintiff's property, which is situated on Filbert between Seventeenth and Eighteenth Streets; but where the elevated road, in its course westward, reaches Twentieth Street, it trends to the north, and is supported over the cartway of Filbert Street by iron pillars having their foundations in that street inside the curb line, and thus extends westwardly to the Schuylkill River. Opposite the plaintiff's lot the railroad structure occupies land owned by the company.

The plaintiff, by his action in the Court of Common Pleas, sought to recover for injuries caused to his property by the smoke, dust, noise, and vibration arising from the use of the engines and cars, the necessary consequence and incidents of the operations of a steam railway.

The trial court refused the defendant's prayer that "the jury should

¹ Compare *Kincaid v. Indiana Nat. Gas Co. et al.*, 124 Ind. 577, 579 (1890), in which it was held that, subject to the right of the public to pass and repass, "the owner of the fee of a rural road retains all right and interest in it." The court (ELLIOTT, J.) said: "There is an essential distinction between urban and suburban highways, and the rights of abutters are much more limited in the case of urban streets than they are in the case of suburban ways." See Randolph, Em. Dom., ss. 401, 413. — ED.

² The statement of facts is omitted; they sufficiently appear in the opinion. — ED.

See 163 44. 38
in this con-
nection.

be instructed that the defendant, under its charter and supplements in evidence, had full lawful authority to create and operate the Filbert Street extension or branch described in the declaration without incurring any liability by reason thereof for consequential damages to the property of the plaintiff, the uncontradicted evidence being that none of the said property was taken by the defendant, but that the entire width of Filbert Street intervenes between the railroad of the defendant and the nearest point thereto of the property of the plaintiff;" and instructed the jury that the only question for them to determine was the amount of depreciation in value of the plaintiff's property caused by the operation of the railroad, and that in estimating the damages they should consider the value of the property before and its value after the injury was inflicted, and allow the difference. The plaintiff recovered a verdict and judgment. The judgment was reversed by the Supreme Court of Pennsylvania (13 Atl. 690), because of the action of the trial court in refusing to grant the defendant's prayer for instruction, and, in effect, because the plaintiff had no cause of action. By the specifications of error contained in this record we are asked to reverse the judgment of the Supreme Court of Pennsylvania because the plaintiff in error was thereby deprived of her property without compensation, because she was thereby deprived of the equal protection of the laws, and because she was thereby deprived of her property without due process of law. . . .

The first proposition asserted by the plaintiff, that her private property has been taken from her without just compensation having been first made or secured, involves certain questions of fact. Was the plaintiff the owner of private property, and was such property taken, injured, or destroyed by a corporation invested with the privilege of taking private property for public use? The title of the plaintiff to the property affected was not disputed, nor that the railroad company was a corporation invested with the privilege of taking private property for public use. But it was adjudged by the Supreme Court of Pennsylvania that the acts of the defendant which were complained of did not, under the laws and Constitution of that State, constitute a taking, an injury, or a destruction of the plaintiff's property.

We are not authorized to inquire into the grounds and reasons upon which the Supreme Court of Pennsylvania proceeded in its construction of the statutes and Constitution of that State, and, if this record presented no other question except errors alleged to have been committed by that court in its construction of its domestic laws, we should be obliged to hold, as has been often held in like cases, that we have no jurisdiction to review the judgment of the State Court, and we should have to dismiss this writ of error for that reason.

But we are urged to sustain and exercise our jurisdiction in this case, because it is said that the plaintiff's property was taken "without due process of law," and because the plaintiff was denied "the equal protection of the laws," and these propositions are said to pre-

sent Federal questions arising under the Fourteenth Amendment of the Constitution of the United States, to which our jurisdiction extends.

It is sufficient for us in the present case to say that, even if the plaintiff could be regarded as having been deprived of her property, the proceedings that so resulted were in "due process of law."

The plaintiff below had the benefit of a full and fair trial in the several courts of her own State, whose jurisdiction was invoked by herself. In those courts her rights were measured, not by laws made to affect her individually, but by general provisions of law applicable to all those in like condition. . . .

The plaintiff in error further contends that by the proceedings in the courts of Pennsylvania she was denied the equal protection of the laws. We understand this proposition to be based on the allegation that those suitors whose property abutted on Filbert Street between the Schuylkill River and Twentieth Street, where the elevated road actually occupies the territory of Filbert Street, were allowed by the Pennsylvania courts to recover damages for the injury thus occasioned to their property, while the plaintiff, and those in like case, whose property abutted on Filbert Street where it was not occupied by the railroad structure, which was erected on the opposite side of the street, on land belonging to the railroad company, were not permitted to recover. The diversity of result in the two classes of cases is supposed to show that equal protection of the laws was not afforded to the unsuccessful litigants. It is not clear that the facts are so presented as to authorize us to consider this question. Neither in the plaintiff's declaration, in the instructions prayed for, nor in the charge of the trial court, do we perceive any finding or admission that there were suitors, holding property abutting on Filbert Street, who were held entitled to recover for damages occasioned by the elevated railroad. However, the third assignment of error is as follows: "The Supreme Court of Pennsylvania erred in deciding that the present cause was different in principle from the case of *Railroad Co. v. Duncan*, 111 Pa. St. 352, 5 Atl. 742, and *Railroad Co. v. Miller*, 132 U. S. 75, 10 Sup. Ct. 34. The effect of said decision is that, under the same constitutional guaranties, it gives to one person a right to compensation for property damaged by the defendant in the exercise of its power of eminent domain, and denies it to another; and as, in this instance, the decision is against the plaintiff's right to compensation for the injury to her property by the defendant, she is thereby deprived of the equal protection of the laws." The counsel of defendant in error, in their printed brief, make no point that the facts are not shown by this record, but discuss the question on its merits. We are referred in the printed briefs to our own case of *Railroad Co. v. Miller*, 132 U. S. 76, 10 Sup. Ct. 34, in the report of which it appears that one Duncan, whose property abutted on Filbert Street, where that street was occupied by the elevated railroad in question, was permitted by the State courts to recover for

damages suffered by having been deprived of access to, and the free use of, Filbert Street.

Conceding, for the sake of the argument, that the facts are as alleged by the plaintiff in error, we are unable to see any merit in the contention that the Supreme Court of Pennsylvania, in distinguishing between the case of those who, like Duncan, were shut off from access to and use of the street by the construction thereon of the elevated railroad, and the case of those who suffered, not from the construction of the railroad on the street on which their property abutted, but from the injuries consequential on the operation of the railroad, as situated on defendant's own property, thereby deprived the plaintiff of the equal protection of the laws. The two classes of complainants differed in the critical particular that one class suffered direct and immediate damage from the construction of the railroad in such a way as to exclude them from the use of their accustomed highway, and the other class suffered damages which were consequential on the use by the defendant company of their franchise on their own property. . . .

It should also be observed that the plaintiff does not complain that, by any legislative enactment, she has been denied rights granted to others, but she attributes error to the judgment of the Supreme Court of Pennsylvania in construing that provision of the Constitution of the State which gives a remedy for property injured by the construction of a railroad, as not extending the remedy to embrace property injured by the lawful operation of the railroad. It is not pretended that by such a construction of the law the plaintiff has been deprived of any right previously enjoyed. The scope of the remedy added by the Constitution of 1874 to those previously possessed by persons whose property is affected by the erection of a public work is declared by the court not to embrace the case of damages purely consequential.

In so holding it does not appear to us that the Supreme Court of Pennsylvania has either deprived the plaintiff of property without due process of law, or denied her the equal protection of the law, and its judgment is accordingly affirmed.

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NEWBY v. PLATTE COUNTY.

SUPREME COURT OF MISSOURI. 1857.

[25 Mo. 258.]

P. R. Hayden, for appellant.

I. Newby was entitled in damages to the full value of his land appropriated and taken for the road, and the court in the assessment thereof had no right to take into consideration the probable or incidental

¹ This case contains nowhere any statement of facts. — Ed.

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the road to him could not be set off against his claim
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well as the advantages of the road. If the law is nothing more in effect than the exercise of both powers of gov. in the same breath

advantages which might or should accrue to Newby from the road in its enhancement of the value of his adjacent lands. (See Constitution of Missouri, article 13, section 7; 5 Dana, 32; 7 Dana, 87; 9 Dana, 114.)

LEONARD, J., delivered the opinion of the court. . . . The 17th section of the 2d article of the general road law of 1845 (R. C. 1846, p. 974) provides that, in assessing the land-owner's damages, the commissioners "shall take into consideration the advantages as well as the disadvantages of the road to such persons." The present road was authorized to be established as a State road by the special Act of the 7th February, 1849, and the proceedings for this purpose are directed to be according to the general road law of 1845, and the amendatory Act of the 25th of January, 1847. On an appeal from the County Court, the plaintiff's damages as a land-owner were assessed in the Circuit Court by the court in lieu of a jury, on an agreed statement of the facts, and the Circuit Court, when applied to for that purpose, refused to declare that the plaintiff "was entitled to the value of the land taken for the road, and that the advantages of the road to him could not be set off against his claim for the value of the land," and decided that the plaintiff was not entitled to any money compensation for the land taken for the public use; and thus the validity of the statute provision to which we have referred is submitted to our judgment by the present proceedings. If the State government possessed no authority over private property except that of taking it for the public use upon rendering the owner a just compensation, it would seem that, under this provision, the owner would be entitled to the full money value of his property without any deduction. The rule of constitutional law being that private property cannot be taken for public use, by the authority of the legislature, without a just compensation, it follows that what is to be considered as compensation within the meaning of the clause is a question of law for the courts, and not a matter for the legislature; and, under such a constitution as we have supposed, with no other power over private property than that of taking it for the public use upon making the owner a just compensation, it would be quite beyond the scope of the legislative authority to declare that the benefit derived by the land-owner from the road is the just compensation secured by the Constitution. If the provision were that the owner should be indemnified against the act complained of, it might be insisted, that, in ascertaining the extent of the damages sustained, the advantages as well as the disadvantages resulting from the act must be taken into consideration; and this seems to be the view taken of the subject by the Supreme Court of Ohio, in Simonds and others against Cincinnati (14 Ohio, 174), under the Constitution of that State, which expressly requires the compensation to be made in "money." But that is not the language nor the scope of the provision. The declaration of the Constitution is, that no private property ought to be taken or applied to public use without a just compensation; and this would seem to imply that the party should receive the value of his property in money. The transac-

general benefits that they would derive in common with the landowners from building the road. (Law. court judge reversed on other grounds?)

tion is a forced sale to the public, and the Constitution in this provision secures to the owner the just price of his property as the only condition upon which he can be lawfully deprived of it.

The government, however, possesses other powers over private property beside the right of eminent domain; and if in the exercise of the taxing power, the government may lawfully require the adjacent land-owners to contribute towards paying for the right of way in proportion to the benefit each will derive from the road, the present enactment, so far as it directs the advantages of the road to be deducted from the price of the land, must perhaps be considered as an exercise of the taxing power. This law is, indeed, nothing more in effect than the exercise of both powers of government in the same breath — that of taking the land by the right of eminent domain, and of requiring, under the taxing power, the adjacent land-owners to contribute to the cost of it in proportion to the benefit each will derive from the road. We have an instance of express legislation of this character in the St. Louis Charter Amendment Act of the 23d of February, 1853, where it is provided that when it shall become necessary, in order to improve any street, &c., to take private property, the jury shall first ascertain the value of all the ground proposed to be taken, and then assess against the city, for the payment of this debt, a sum equal to the value of the improvement to the general public; and the balance of the money necessary to pay for the ground they shall assess against the owners of the lots fronting on the streets according to the value of their lots, and in the proportion that they will be respectively benefited by the improvement. Under this Act, and the ordinance passed to carry it into execution, when the whole lot is taken, the owner receives the whole value of it in money; but when part only is taken, the value of the part taken and the amount of benefit the owner will derive from the improvement of the street in respect to the residue of his lot are assessed separately, and one being set off against the other, the owner receives or pays the balance as it turns out to be for or against him. (Under the St. Louis Act, the city pays toward the cost of the ground a sum equal to the value of the improvement to the city generally, and the residue of the cost is apportioned among the adjacent lot-owners in proportion to the benefit derived respectively from the improvement.) Under the provisions of the general road law, the adjacent land-owners pay towards the cost of the right of way the value of the improvement to themselves — not exceeding, however, the value of the land taken from them respectively, — leaving the balance of the cost to be paid by the county. Under the St. Louis Act, the sums to be paid by and to the adjacent lot-owners are assessed separately, and when part only of a proprietor's lot is taken, one amount is set off against the other, and the balance only is settled in money. Under the road law, the benefit is in every case deducted from the value of the land taken, and the balance only is formally ascertained and declared; thus what is formally gone through with under the St. Louis Act, step by step, is done substantially at one

A highway is taken through a man's land. It is injury to adjoining land may be great.

blow under the road law. In both cases the legislature exercises the same power over private property, and no other; and although in one case the language employed has a more direct reference to the taxing power than in the other, we are not at liberty, we think, on that account to treat the provision in one act as a prohibited invasion of private property, and to give effect to it in the other as an exercise of a lawful power. If the legislature may, under the taxing power, lawfully require the contribution, and if this provision in the road law be substantially such a requisition, as we think it is, we are not at liberty to treat it as a nullity, but must give effect to it accordingly. In a case now before us at St. Louis (*Garrett v. St. Louis*), under the St. Louis Act before referred to, part of the plaintiff's lot was taken for the improvement of Main Street, and he insists upon being paid the whole assessed value of the part taken, without any deduction on account of the assessment against him for benefits in respect to the residue of his ground; and the question there is as to the validity of what is in that case express taxation for a local object, — while in the present case it is as to the validity of what is, in effect, though not in words, a like assessment for a like purpose.

In both cases the only question, as it appears to us, is as to the competency of the legislature to require the adjacent land-owners to contribute towards the cost of the ground for a road or street, in proportion to the benefit; or, to state the proposition in more general terms, it is as to the constitutional validity of taxes imposed by a subordinate authority in the State upon an arbitrary district of country, in proportion, not to the value of the property, but to the benefit to be derived by the owner from the improvement.

Upon this question we begin by remarking that the power of taxation, as the more subordinate power of taking private property for the use of the public, without any reference to the owner's duty to contribute to a common burden, exist and are exercised of necessity in every nation as legitimate powers of civil government, and appertain to our State government as part of the legislative power, without any express grant for that purpose. The right of eminent domain is, in its nature, capable of being limited and regulated in some degree by general rules, and has accordingly, as we have already remarked, been confined in all civilized States by the practice of government, and in our American republics by express constitutional provision, to cases of public necessity and convenience, on the payment to the owner of a just compensation. But the power of taxation is more indefinite in its character, and less capable of limitation by general rules of law, — the amount of money to be raised, and to what purpose it shall be applied, and the persons and things that shall contribute to it and according to what rule of apportionment, are all matters left almost of necessity to the discretion of the legislative department, — the only express limitations in our Constitution upon the taxing power being that "all property subject to taxation shall be taxed in proportion to its value," and the prohi-

bition against taxing the lands of non-residents higher than residents' lands.

The validity of the enactment now under consideration, considered as an exercise of the taxing power, is not questioned upon the ground of its being a local tax. There are everywhere, in all civilized States, two sorts of public expenditure, — those that concern the whole State in general, and those that are confined to its civil subdivisions and lesser localities, and both justice and convenience require, and have accordingly introduced into the practice of all governments, corresponding general and local taxation. (Domat, Pub. Law Book, I., tit. 5, secs. 1 and 5.) Our own practice, corresponding with the general practice of the other States, has been to meet the general burdens by general taxation, and to make it the duty of the local authorities to raise and expend within their respective limits, under such restrictions as the legislature should deem proper, the taxes applicable to the local public service. The manifest equity and convenience of these local assessments, for the accomplishment of local purposes, has brought them more and more into general use, confining them, in very many instances, to very small localities; and no one now questions their validity, although at an early day the constitutional validity of taxation levied by subordinate tribunals was questioned, on the ground that it was levied without the consent of the people or their representatives; or, in other words, that it was an exercise of the legislative power of taxation which it was not competent for the legislature to delegate to others. (County Levy Case, 5 Call, 139.) That objection, however, was overruled in the case in which it was made, and has never been regarded in American legislation.

The objections that have since been relied upon to these local assessments for local improvements are that it is not "legitimate taxation," and that in this State, under our Constitution, they are not valid as taxes, because they are apportioned according to the benefit and not according to the value of the property as required by the Constitution. The position assumed is that "legitimate taxation is limited to the imposing of burdens or charges for a public purpose equally upon the persons or property within a district known and recognized by law as possessing a local sovereignty, for certain purposes, as a State, county, city, town, village, &c.;" and consequently road and street and other similar assessments for local improvements are no other than the taking of private property, under color of the taxing power, without providing the compensation required by the Constitution. This idea, it is believed, was first formally announced in New York, in the case of *The People v. Mayor of Brooklyn*, 6 Barb. 216, and is said to have originated in the Court of Appeals of Kentucky, in the case of *Sutton's Heirs v. City of Louisville* (5 Dana, 28). The New York case was an assessment on a lot-owner in proportion to the benefit for the purpose of building a sewer, and the Kentucky case was a similar assessment for the extension of a street, and both assessments were decided to be uncon-

stitutional, as not being legitimate exercises of the taxing power. The New York case, however, was reversed on appeal, in the Court of Appeals (4 Comst. 428), and the doctrine itself seems to have been subsequently abandoned in effect in Kentucky, in the case of the *City of Lexington v. McMillain's Heirs*, 9 Dana, 513, by the same court, composed of the same judges, in which it originated. In the latter case, Lexington was authorized by its charter to cause the streets to be paved at the expense of the lot-owners in each square, either upon the application of the greater part of them, or without such application by the unanimous consent of the mayor and council; and one question being as to the validity of an assessment that had been made pursuant to an ordinance passed with the required unanimity, the court held it valid, suggesting that each square might be considered an independent municipality for this purpose. Upon principle, there is nothing, we think, in the objection.

In distinguishing taxation from the taking of private property under the right of eminent domain, it has been well observed that taxation exacts property from individuals as their respective shares of contribution to a public burden. Private property taken by the right of eminent domain is not taken as the owner's share of such a contribution, but as so much beyond it. Taxation operates upon a class of persons or things, and by some rule of apportionment. The exercise of the right of eminent domain operates upon individual persons or things, and without any reference to what is exacted from others. The present tax, if we may consider it as one, operates upon a class of persons, — the owners of the several tracts of land over which the road passes, — is assessed against them in proportion to the benefit each derives from the improvement, and is exacted from them as their respective shares of contribution to the establishment of the road. We may remark, too, that taxation of this character has prevailed too long and too extensively to be treated as illegitimate, or denounced as legislative spoliation under the guise of the taxing power. It prevailed in England several centuries ago; and the assessments made there by the commissioners of sewers on the lands affected by their operations was taxation of this character. (28 Hen. VIII., chap. 5, sec. 5.) In Massachusetts, from an early period, meadows, swamps, and lowlands were required to be assessed among the proprietors to pay the expense of draining them (Rev. Stat. of Mass. p. 673), and in Connecticut the same power was given to commissioners for draining marshy lands (Conn. Stat. ed. 1839, p. 544). It is said by the judge, who delivered the opinion of the Court of Appeals in the Brooklyn case before referred to, that the system of local taxation for local improvements, by assessing the burden according to the benefit, had prevailed for more than one hundred and fifty years, and that this power was given to the corporation of New York in 1691, and had since been conferred on nearly every city and on many of the villages of the State. We are informed in the opinion of the Supreme Court of Kentucky, in the Lexington case before referred to,

that the assessment of benefits for the improvement of streets had been sanctioned as constitutional in Louisiana, South Carolina, and Pennsylvania; had been virtually recognized by the courts in New York and Massachusetts, and had never been declared unconstitutional by any court, so far as they had been able to ascertain; and we may ourselves remark that similar taxation is authorized by law in New Jersey, Maryland, Virginia, Ohio, and Indiana, and either acquiesced in by these communities or adjudged valid by their courts. Finally, the validity of local assessments of this character was considered and affirmed in this court at our last St. Louis fall term, in the case of *Lockwood v. The City of St. Louis*, 24 Mo. 20, where the assessment was to construct a common sewer, and was levied on all the lots in an arbitrary district, — laid off by the corporation for the purpose of constructing the sewer. . . . But, although we concur with the Circuit Court in thinking this section of the road law constitutional, yet the judgment must be reversed upon another ground. The only facts agreed between the parties, and upon which the decision was pronounced, were, that the road ran "through the plaintiff's land one hundred and twenty-two poles, and occupied one and one-half acres of ground, worth fifteen dollars per acre;" but it was not admitted that the road was any benefit to the party, and the court, we think, could not infer this as a matter of law from the agreed facts, and pronounce against allowing the plaintiff any compensation for the property of which he was deprived.

As to the proper rule by which to compute the benefits in cases of this character, it may not be improper, as the case is to be remanded for further proceedings, to remark that the Supreme Court of Massachusetts, in the case of *Meacham v. The Fitchburg Railroad Co.*, 4 Cush. 392, declared that the benefits to be charged against the adjacent land-owners and deducted from the compensation to be paid to them were the direct and peculiar benefits that would result to them in particular, and not the general benefit that they would derive in common with other land-owners from the building of the road; and this seems to be substantially the principle adopted by our own legislature as just and equitable in the St. Louis Street Improvement Act before referred to, and ought perhaps to be followed in the construction of this provision of the road law. In reference to the disadvantages, it is to be observed that the Constitution only secures to the owner the price of his property, but it is competent for the legislature to go beyond this, and not only pay him the value of his property, but also indemnify him against any damage that will result to him from the use to which it is to be applied; and this they have effected by requiring the disadvantages as well as the advantages to be taken into consideration in the assessment of the damages. JUDGE RYLAND concurring, the judgment is reversed, and the cause remanded.

SCOTT, J., dissenting. I dissent from so much of the opinion of the majority of the court as maintains that, in the computation of the damages to be paid to the owner of the property taken for public use, regard

must be had to the advantages and disadvantages resulting to such owner from the use to which the property may be applied. The value in cash of the thing taken, considering its place and situation, is the compensation contemplated by the Constitution to which the owner, as such, is entitled. The legislature may compensate disadvantages with advantages, but the value of the property taken must be paid for in money.¹

In *Wagner v. Gage County*, 3 Neb. 237 (1874), on appeal from the award of commissioners to assess damages from the laying out of a road, it appeared that the presiding judge below had instructed the jury as follows:—

"In your consideration of the evidence, you will not take into consideration any consequential damages that might possibly occur by reason of the location of such road, nor what might be consequential costs of erecting fences; but the measure of damages is the difference between the market value of the premises immediately before the road was located, and the market value thereof immediately after its location."

The jury found a verdict for the defendant; whereupon the plaintiff filed a motion for a new trial, which being overruled by the court, judgment was rendered on the verdict. To reverse this judgment the cause was brought to this court by petition in error.

N. K. Griggs and *W. H. Ashby*, for plaintiff in error. *S. C. B. Dean* and *W. J. Galbraith*, for defendant in error.

MAXWELL, J. Section thirteen of the bill of rights in our Constitution declares that "the property of no person shall be taken for the public use without just compensation therefor;" and that section is only declaratory of the common law. . . .

Our statutes (General Statutes, 955) provide the mode of locating new roads, and section twenty-four of the chapter provides for compensation to the owner of the land.

The question arises, what is just compensation? All the cases seem to concur in excluding mere general and public benefits, which the owner of the land shares in common with the rest of the inhabitants of the vicinity, from being taken into consideration in estimating compensation. While this is the law in theory, in several of the States it seems to be disregarded.

In Massachusetts the court held, "the jury might and ought to have returned that the party sustained no damages, if such was their conviction; the benefit the owner of the land derived from the laying out of a way over it may often exceed the value of the land covered by the way." *Commonwealth v. Sessions of Middlesex*, 9 Mass. 388. And the same doctrine has been held in Vermont. *Livermore v. Ja-*

¹ Affirmed in *State v. City of Kansas*, 89 Mo. 34 (1886). Compare *Kennedy v. Indianapolis*, 103 U. S. 599; *Bloomington v. Latham et al.*, 142 Ill. 462, and the cases on special assessments, *infra*, pp. 000 to 000. — Ed.

In estimating the compensation to be given for the taking of land the mere general and public benefits to the owner of the land share in common with those of the neighborhood from being taken into consideration. Compensation should be made for the fair market value of the land actually taken, while special benefits may be set off against any special injury to the residue of the tract.

value of the land actually taken, while special benefits may be set off against any special injury to the residue of the tract.

maica, 23 Vt. 361. And in Pennsylvania the court held, "the more common mode of estimating land damages unquestionably is, to give the company the specific benefit caused to land, a portion of which is taken, in the enhancing the value of the same, and only to allow the land-owner such a sum as will leave him as well off in regard to the particular land, as if the works had not been built, or his land taken. This is done by giving the land-owner a sum equal to the difference between what the land would have sold for before the road was built, and what the remainder will sell for after the construction." *Harvey v. Lackawanna & Bloomsburgh R. R.*, 47 Pa. St. 428; *Troy & Boston R. R. v. Lee*, 13 Barb. 169; *Matter of Furnam Street*, 17 Wend. 649.

The Supreme Court of Ohio, since the adoption of the Constitution of 1851, hold that in all cases compensation must be made for the land actually taken. The court says, in regard to the provisions of the Constitution providing for compensation, "by the one, the compensation is to be assessed without deduction for benefits, and by the other irrespective of benefits, and by each a full compensation is required. Now, when is a man fully compensated for his property? Most clearly and unquestionably when he is paid its full value, and never before. The word 'irrespective' relates to this full compensation, and binds the jury to assess the amount without looking at or regarding any benefits contemplated by the construction of the improvement. When this is done, and this consideration wholly excluded, the jury have nothing to do but ascertain the fair market value of the property taken. . . . Whether the property is appropriated directly by the public, or through the intervention of a corporation, the owner is entitled to receive its fair market value at the time it is taken, as much as he might fairly expect to be able to sell it to others, for if it was not taken, and this amount is not to be increased from the necessity of the public or the corporation to have it, on the one hand, nor diminished from any necessity of the owner to dispose of it, on the other. It is to be valued precisely as it would be appraised for sale upon execution, or by an executor or guardian, and without any regard to the external causes that may have contributed to make up its present value." *Giesy v. C. W. & Z. R. R. Co.*, 4 Ohio St. 330-332.

This seems to us to be the only just and equitable rule, requiring in all cases that compensation shall be made for the fair market value of the land actually taken, while special benefits may be set off against any local or incidental injury to the residue of the tract.

Section nineteen of the bill of rights of the Ohio Constitution provides, that compensation for property taken for public use shall be assessed by a jury "without deduction for benefits to any property of the owner." This provision seems to have been incorporated in the Constitution of 1851, in consequence of the decisions of the Supreme Court of that State in *Symonds v. The City of Cincinnati*, 14 Ohio, 147; and *Brown v. The Same*, 14 Id. 541, where the court held it was

competent for the defence to show the benefit conferred on the owner by the appropriation, such benefit to be considered by the jury in estimating the damages. We think the words "without deduction for benefits" adds nothing to the term "just compensation," and that the same rule is as applicable in our State as in Ohio.

The jury in this case having found for the defendant, it was the duty of the court to set aside the verdict and grant a new trial.

The judgment of the District Court is reversed, and cause remanded for a trial *de novo*. *Reversed and remanded.*¹

MR. CHIEF JUSTICE LAKE concurs.

IN *Conn. River R. R. Co. v. County Com'rs of Franklin*, 127 Mass. 50 (1879), a statute had required the manager of a railroad owned by the State, upon the direction of the Governor and Council, to take certain land for the purposes of the road, and provided that it should be paid for out of the earnings of the road. It was admitted that these earnings would "probably be amply sufficient" to meet these payments. The manager, having been duly directed, entered upon the land, and petitioned the county commissioners to proceed in ascertaining and awarding damages. In granting a writ of prohibition against the commissioners, the court (GRAY, C. J.) said: "Two questions are presented by the case, and have been argued by counsel: First. Whether the St. of 1878, c. 277, is unconstitutional, for want of a sufficient provision for the payment of compensation for the land taken? Second. Whether the writ of prohibition is a suitable remedy?"

“The Constitution of the Commonwealth declares that, ‘whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensa-

¹ And so *Omaha v. Howell Lumber Co.*, 30 Neb. 633, 635 (1890). Compare *Terry v. Hartford*, 39 Conn. 286, *Randolph, Em. Dom. s. 273*. In *Omaha South. Ry. Co. v. Todd*, 58 N. W. Rep. 289 (Neb. 1894), the court (RAGAN, C.), said: "The damages to which a land-owner is entitled by reason of the construction of a railway across his farm are (1) the actual value of the land taken, at the time of the taking, without diminution on account of any benefit, advantage, or other set-off, whatsoever; (2) the depreciation in the value of the remainder of the tract of land caused by the appropriation of a part thereof for railway purposes, and the construction and permanent operation and occupation of the railroad thereon, excluding general benefits. *Railroad Co. v. McKinley*, 64 Ill. 339; *Railroad Co. v. Wiebe*, 25 Neb. 542, 41 N. W. 297; *Robbins v. Railroad Co.*, 6 Wis. 610; *Railroad Co. v. Horn*, 41 Ind. 479. In an inquiry whether, and how much, the part of a farm not taken for railroad right of way is depreciated in value by the appropriation of a part, evidence as to the size of the farm; the purpose for which it is used; the improvements thereon, and how located; the direction of the road across the farm; the cuts and fills made or to be made in the construction of the road; the width of the right of way; the height of embankments; the depth of ditches; the inconvenience in crossing the track from one part of the farm to another; the liability of stock being killed; and danger from fire from passing trains, — are all facts competent for the jury's consideration in determining the depreciation in value of the remainder of the farm. *Railway Co. v. Beeson*, 36 Neb. 361, 54 N. W. 557." See *Leroy & West. R. R. Co. v. Ross et al.*, 40 Kans. 598; *Meacham v. Fitchb. R. R. Co.*, 4 Cush. 291. — Ed.

tion therefor.' Declaration of Rights, art. 10. It has long been settled by the decisions of this court, that a statute which undertakes to appropriate private property for a public highway of any kind, without adequate provision for the payment of compensation, is unconstitutional and void, and does not justify an entry on the land of the owner without his consent. *Commonwealth v. Peters*, 2 Mass. 125; *Perry v. Wilson*, 7 Mass. 393; *Thacher v. Dartmouth Bridge*, 18 Pick. 501. 'Under our Constitution,' said Chief Justice Shaw, 'the Act conferring the power must be accompanied by just and constitutional provisions for full compensation to be made to the owner. If the government authorizes the taking of property, for any use other than a public one, or fails to make provision for a compensation, the Act is simply void; no right of taking as against the owner is conferred; and he has the same rights and remedies against a party acting under such authority, as if it had not existed.' *Boston & Lowell Railroad v. Salem & Lowell Railroad*, 2 Gray, 1, 37. So in a case of laying out as a public highway a bridge owned by a private corporation, Mr. Justice Colt said: 'The duty of paying an adequate compensation, for private property taken, is inseparable from the exercise of the right of eminent domain. The Act granting the power must provide for compensation, and a ready means of ascertaining the amount. Payment need not precede the seizure; but the means for securing indemnity must be such that the owner will be put to no risk or unreasonable delay.' *Haverhill Bridge v. County Commissioners*, 103 Mass. 120, 124.

"In *Rogers v. Bradshaw*, 20 Johns. 735, 744, cited by the learned counsel for the respondents, the decision was that the statutes applicable to the case, construed together, expressly provided for the estimate and payment of the damages, and that such payment need not be actually made before the entry upon the land; and the *dictum* of Chancellor Kent, that an omission of the legislature to provide for compensation might not have made the entry a trespass, is opposed to the course of decisions in this Commonwealth, and has not been followed in New York. In *Bloodgood v. Mohawk & Hudson Railroad*, 18 Wend. 1, 17. Chancellor Walworth, while admitting that the legislature might authorize the land of an individual to be entered upon for the purpose of examination or of making preliminary surveys, without compensation, said: 'But it certainly was not the intention of the framers of the Constitution to authorize the property of a citizen to be taken and actually appropriated to the use of the public, and thus to compel him to trust to the future justice of the legislature to provide him a compensation therefor. The compensation must be either ascertained and paid to him before his property is thus appropriated, or an appropriate remedy must be provided, and upon an adequate fund; whereby he may obtain such compensation through the medium of the courts of justice, if those whose duty it is to make such compensation refuse to do so. In the ordinary case of lands taken for the making of public highways, or for the use of the State canal, such a remedy is pro-

vided by act and the court could not compel the respondents to act. After appropriations after two years to be paid back into the treasury. Sup. the Gov. should

vided; and if the town, county, or State officers refuse to do their duty in ascertaining, raising, or paying such compensation in the mode prescribed by law, the owner of the property has a remedy by *mandamus* to compel them to perform their duty. The public purse, or the property of the town or county upon which the assessment is to be made, may justly be considered an adequate fund. He has no such remedy, however, against the legislature to compel the passage of the necessary laws to ascertain the amount of compensation he is to receive, or the fund out of which he is to be paid.' And in *People v. Hayden*, 6 Hill, 359, 361, Chief Justice Nelson said: 'Although it may not be necessary, within the constitutional provision, that the amount of compensation should be actually ascertained and paid before property is thus taken, it is, I apprehend, the settled doctrine, even as it respects the State itself, that, at least, certain and ample provision must be first made by law (except in cases of public emergency), so that the owner can coerce payment through the judicial tribunals or otherwise, without any unreasonable or unnecessary delay.' See also *Rexford v. Knight*, 1 Kernan, 308, 314; *Chapman v. Gates*, 54 N. Y. 132, 146.

"Statutes taking private property for a public highway, and providing for the ascertaining of the damages, and for payment thereof out of the treasury of the county, town, or city, have often been held to be constitutional. *Haverhill Bridge v. County Commissioners*, 103 Mass. 120; *Chapman v. Gates*, 54 N. Y. 132; *Loweree v. Newark*, 9 Vroom, 151; *Yost's Report*, 17 Penn. St. 524; *Powers v. Bears*, 12 Wis. 213, 220; *Commissioners v. Bowie*, 34 Ala. 461. But, in the cases in which it has been so held, the liability to pay the damages rested upon the whole property of the inhabitants of the municipality, and might be enforced by writ of execution or warrant of distress, or by *mandamus* to compel the levy of a general tax. *Hill v. Boston*, 122 Mass. 344, 350; *Rose v. Taunton*, 119 Mass. 99, 101; *Bloodgood v. Mohawk & Hudson Railroad*, and *Rexford v. Knight*, above cited; *Commonwealth v. Commissioners of Allegheny*, 37 Penn. St. 237, 277; *Minkinnah v. Haines*, 5 Dutcher, 388; *Brock v. Hishen*, 40 Wis. 674. The rule has not been extended to cases in which only a special fund was charged with the payment of the damages, and the municipality had no power to levy a general tax to pay them. *Chapman v. Gates*, 54 N. Y. 146; *Keene v. Bristol*, 26 Penn. St. 46.

"In *Ash v. Cummings*, 50 N. H. 591, 621, it was said: 'In cases where the State, or a county, or a town, is to be made liable for the damages which an individual may suffer by having his property taken for the public use, it is not so important that the compensation should be paid or secured in advance, provided the law provides a certain and expeditious way of ascertaining and recovering it, because there the presumption and the fact are that these municipalities are always responsible.' And the saying was quoted with approval by a majority of the court in *Orr v. Quimby*, 54 N. H. 590, 594. But in each case it was *obiter dictum*. *Ash v. Cummings* was the case of a mill-dam

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erected by one individual to the injury of another. In *Orr v. Quimby*, it was admitted that the only question to be determined was whether the defendant had the right to enter and cut trees on the plaintiff's land, and that the question whether the land could be permanently occupied without assessment and payment of damages did not arise; 54 N. H. 596; and the position assumed in the *dictum* above quoted was strongly controverted in an elaborate dissenting opinion of Mr. Justice Doe, as it had previously been in an able judgment of the Supreme Court of Maine, delivered by Chief Justice Shepley. *Cushman v. Smith*, 34 Maine, 247.

“When private property is taken directly by the Commonwealth for the public use, it is not necessary or usual that the Commonwealth should be made subject to compulsory process for the collection of the money to be paid by way of compensation. It is sufficient that the statute which authorizes the taking of the property should provide for the assessment of the damages in the ordinary manner, and direct that the damages so assessed be paid out of the treasury of the Commonwealth, and authorize the Governor to draw his warrant therefor; because, as observed by Chief Justice Bigelow, ‘This is clearly an appropriation of so much money as may be necessary to pay the damages which may be assessed under the Act.’ ‘It is a pledge of the faith and credit of the Commonwealth, made in the most solemn and authentic manner, for the payment of the damages as soon as they are ascertained and liquidated by due process of law.’ *Talbot v. Hudson*, 16 Gray, 417, 431.

“But in the statute before us there is no pledge of the faith and credit of the Commonwealth, no appropriation of the general funds in its treasury, and no authority to the Governor to draw his warrant for the payment of the damages out of such funds. On the contrary, the very terms of the statute preclude the inference of any such pledge, appropriation, or authority, by directing that the land taken for the union passenger station shall be paid for from the earnings of the Troy and Greenfield Railroad and Hoosac Tunnel, and appropriating for the purposes of the Act a sum not exceeding nine thousand dollars, to be paid out of those earnings. St. 1878, c. 277, §§ 6, 8. The fact, admitted by the parties, that those earnings will probably be sufficient to meet and extinguish all claims for damages for lands so taken, falls short of satisfying the requirement of the Constitution that the owner of property taken for the use of the public shall have a prompt and certain compensation, without being subject to any risk or unreasonable delay.

“The provisions of the St. of 1878, c. 277, specifying and appropriating a certain sum out of those earnings for the payment of damages assessed under this Act, are equally conclusive against the suggestion made, though not strongly pressed, at the argument, that the Commonwealth, or the manager acting in its behalf, may be required by the county commissioners, at the request of the land-owner, to give additional security for the payment of the damages under the General Rail-

road Act of 1874, c. 372, § 65. Sections 69 and 72 of that Act, providing that, if the railroad corporation shall not pay the amount of damages awarded by the jury, a warrant of distress or execution may issue to compel the payment thereof, and that, until such warrant or execution is satisfied, all right and authority to enter upon the land, except for making surveys, shall be suspended, and the exercise thereof may be restrained by injunction, are also inapplicable, because in the present case no warrant of distress or execution can issue, either against the manager or against the Commonwealth; not against the manager, because he takes no title himself in the land, but is a mere agent of the Commonwealth, acting under the direction of the Governor and Council, and removable at their pleasure; Sts. 1875, c. 77; 1876, c. 150; 1878, c. 191; not against the Commonwealth, because the Commonwealth is never liable to judicial suit or process, except so far as its own consent thereto has been clearly manifested by statute. *Troy & Greenfield Railroad v. Commonwealth*, ante, 43.

"The St. of 1878, c. 277, therefore, so far as it purported to authorize the taking of land of the Connecticut River Railroad Company for a union railroad station, was unconstitutional, and the taking under that Act was void, for want of any provision for adequate and certain compensation to the owner.

"That taking, being unauthorized and void, did not alter the rights of the owner of the land, vested no title in the Commonwealth, and could not be the basis of a petition to the county commissioners for the assessment of damages as for land lawfully appropriated to the public use. The invalidity of the taking and the consequent want of jurisdiction in the county commissioners are not cured by the St. of 1879, c. 290, passed since this case was argued, and providing that the sums of money required under the St. of 1878, c. 277, shall be paid from the treasury of the Commonwealth, instead of from the earnings of the Troy and Greenfield Railroad and Hoosac Tunnel. The statement of Mr. Justice Baldwin, in *Bonaparte v. Camden & Amboy Railroad*, Bald. 205, 226, that it is not indispensable that a law permanently appropriating private property to the use of the public should contain a provision for compensation, or prescribe the mode of making it, but that such a law would be valid if the legislature should by a subsequent law direct compensation to be made, appears to have been founded on the *dictum* of Chancellor Kent referred to in the early part of this opinion, and is inconsistent with the settled law of this Commonwealth, and with the weight of authority elsewhere."

In *Brickett v. Haverhill Aqueduct Company*, 142 Mass. 394 (1886), the defendant, under a statute purporting to authorize the taking and use of the waters of certain ponds, took the waters of Kenoza lake and

¹ Compare *United States v. Engerman*, 46 Fed. Rep. 176, holding that under the Constitution of the United States a jury is not necessary. And so in other jurisdictions. See *Randolph, Em. Dom. s. 316*. — Ed.

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built a dam across a river which was the only outlet of the lake; whereby, as the plaintiff alleged, the flow of the stream through his land was prevented. The State provided for paying "all damages sustained by entering upon and taking" these waters. The plaintiff brought a common-law action of tort, and a verdict was ordered for the defendant. In setting aside this verdict on the ground that the defendant might, perhaps, have exceeded the statutory authority, the court (MORRIS, C. J.) said: "Without doubt, the defendant was liable to the plaintiff in some form of proceeding for any damage sustained by him by reason of taking the water and building the dam. *Watuppa Reservoir Co. v. Fall River*, 134 Mass. 267. But it is settled that, when the legislature authorizes a municipal or other corporation to take private property for public uses, and provides in the statute a mode of ascertaining and recovering the damages, such statutory remedy is the only remedy to which the injured party can resort for acts done within the authority of the statute.

"It follows that the plaintiff cannot maintain an action of tort for injuries caused to him by any acts of the defendant which it was authorized to do under the statute, but his only remedy is the one pointed out by the statute.

"The plaintiff recognizes this principle; but contends that the St. of 1867 is unconstitutional and invalid, because it does not make adequate provision for the recovery of damages caused by the defendant's acts under it.

"The Constitution provides that, 'whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.' Declaration of Rights, art. 10. Undoubtedly, a statute which attempts to authorize the appropriation of private property for public uses, without making adequate provision for compensation, is unconstitutional and void. *Connecticut River Railroad v. County Commissioners*, 127 Mass. 50, and cases cited. But the St. of 1867 does not undertake to do this. It provides, in substance, that the corporation shall be liable to pay all damages for injury to private property, and specifies a sufficient remedy to enable the person injured to recover such damages. We are not aware of any case in which it has been held that such provisions are not a sufficient compliance with the requirement of the Constitution. The instances are numerous in which aqueduct companies have been incorporated by statutes which contain the same provisions for securing compensation. The successive legislatures, in these statutes, recognized the constitutional obligation to make adequate compensation, and deemed that such provisions did, with practical certainty, secure the rights of individuals whose property was taken or injured.

"They undoubtedly took into consideration, not only the special remedy provided by each statute, but the other rights and remedies which an individual would have under the general laws, if his damages

are sufficient. We see there are many questions involved in the law of our domain that are not really constitutional questions.

were not paid after they were ascertained. Take the case before us. If the plaintiff, or any person injured, had, upon proper application, had his damages ascertained, he would be entitled to a warrant of distress to compel the payment of them; Pub. Sts. c. 110, § 18; if this was ineffectual, and the defendant still refused to pay, without doubt this court would, by proceedings in equity, restrain the defendant from a further use of the water, and, if necessary, order the removal of the dam.

"The question whether the provision for compensation furnished by the statute is an adequate one is a practical question. It seems to us that the remedy which the statute in question furnishes against the corporation, supplemented by the remedies afforded by the general laws, if it refuses to pay the damages assessed, affords to any person whose property is taken or injured by the acts of the corporation a reasonable certainty that he will recover and receive compensation therefor. We are not, therefore, prepared to hold that the statute is unconstitutional, because it does not make adequate provision for compensation.

"The case of *Connecticut River Railroad v. County Commissioners*, *ubi supra*, is quite different from the case at bar. In that case, in the statute which was held to be unconstitutional, no person or corporation, neither the State nor the manager of the railroad, was made liable for the damages, but the plaintiff was left to look solely to a future uncertain fund, and he was provided with no means of enforcing his claim against the fund.

"We do not deem it important that the land of the plaintiff which was injured was outside of the limits of this State. The language of the Act is general, and puts all water rights upon the same footing, and applies to a proprietor outside the State. Such proprietor certainly has no greater rights than the citizen whose lands or water rights within the State are injured by the acts of the defendant under the authority of the legislature. Whether the constitutional objection we have considered would be open to a citizen of another State, whose lands or water rights in that State are injured, we need not discuss nor decide.

"It follows that the plaintiff cannot maintain this action for damages caused by any acts of the defendant which are authorized by the statute."¹

¹ And so *Cherokee Nation v. So. Kans. Ry. Co.*, 135 U. S. 641. See *supra*, pp. 979-990; *Tuttle v. Knox County*, 89 Tenn. 157 (1890); *Wallace v. R. R. Co.*, 138 Pa. 168 (1890).

"The fundamental doctrine, of course, is that private property cannot be taken for public purposes without just compensation, but this need not be given in all cases concurrently in point of time with the actual exercise of the right of eminent domain. It is enough if an adequate and certain remedy is provided whereby the owner of such property may compel payment of his damages. (*Bloodgood v. M. & H. R. R. Co.*, 18 Wend. 9; *Lyon v. Jerome*, 26 Id. 585; *People ex rel. Utley v. Hayden*, 6 Hill, 359; *Roxford v. Knight*, 11 N. Y. 308.) This means reasonable legal certainty. (*Chapman v. Gates*, 54 N. Y. 146; *Sage v. City of Brooklyn*, 89 Id. 189.)"—DANFORTH, J., for the court, in *In the Matter of the Pet'n of the U. S.*, 96 N. Y. 227.

In *The State v. Perth Amboy*, 52 N. J. Law, 132 (1889), the Supreme Court of New Jersey (GARRISON, J.) said: "The ordinance brought up by this writ is nugatory if the charter of the city of Perth Amboy contains no provision by which private lands can be taken for public use by the proceedings in question.

"The sovereign power of compelling an owner to part with the title to his lands is coupled with the correlative duty of providing for the payment of the compulsory purchase. By the Constitution of this State a distinction is made between those cases in which property is taken directly by the State, as by a municipal corporation by State authority, and those cases in which a private corporation, acting as the State's agent, appropriates private property for a public purpose. In the latter case actual compensation to the owner must precede the taking of his lands, whereas in the former it is enough if provision be made by which the owner can obtain compensation, and that an impartial tribunal is provided for assessing it. *Lowerce v. Newark*, 9 Vroom, 151; *Wheeler v. Essex Road Board*, 10 Id. 291.

"A law which lacks these requisites will not authorize the exercise of this sovereign right. Furthermore, the provision which thus enables the owner to obtain compensation for his lands must be in existence at the time the power to compel him to part with them is exerted. *Gaines v. Hudson County Commissioners*, 8 Vroom, 12.

"Where no such legislation exists, the owner may resist the initial step toward the divestment of his title. The invasion of his own rights as well as his duties to the representatives of the public requires him to challenge the improvement at its threshold, before outlay and acquiescence shall have worked to his detriment and to theirs. *Gaines v. Hudson County Commissioners*, *supra*.

"The remedy, moreover, in cases when compensation is deferred, must be adequate, one to which the party can resort of his own motion; it must not be burdened by unusual steps of procedure or other vexatious features. *Butler v. Sewer Commissioners*, 10 Vroom, 667. Such a remedy can exist only where the owner, who is compelled to part with his property without being paid the price, has his damages legally ascertained under the law which authorized the taking.

"The tribunal which is thus to assess the owner's damages may be determined by the Constitution or by the statute under which the condemnation proceedings are had. Where the Constitution is silent as to the manner in which the assessment for property taken shall be made, the power to take is dormant until the legislature supplies the plan. However ordained, the proceeding is judicial in character, and the party in interest is entitled to have an impartial tribunal and the rights and privileges usually deemed essential to a judicial investigation. And, in general, by whatever method the property of an individual is to be divested, under color of law, by proceedings against his will, the existence of the proper machinery must be clear in the law, and a strict compliance with all those provisions which have been therein made for his protection must be shown. *Davis v. Howell*, 18 Vroom, 280; 2 Dill. Mun. Corp. § 604.

"We have seen that, in the absence of controlling constitutional provision, it is competent for the State to authorize municipal corporations to take private lands for public use without first making payment therefor, although such a course is characterized by Judge Dillon as an unusual one — 'The almost invariable, and certainly the just, course being to require payment to precede or to accompany the act of appropriation.' 2 Dill. Mun. Corp. 615.

"The power delegated, moreover, being a stringent and extraordinary one, no presumptions will be intended against the owner. In any event, if a legislative purpose to postpone appropriation to payment be discovered, it will be given strict effect.

"Applying these general principles to the case in hand, it is clear that the proceedings open to the defendant under its charter neither provide for the compensation of the prosecutrix in respect to her lands, nor do they give her that adequate remedy which the organic law guarantees." — Ed.

FORSTER v. SCOTT.

NEW YORK COURT OF APPEALS. 1893.

[136 N. Y. 577.]

APPEAL from judgment of the General Term of the Superior Court in the city of New York, entered upon an order made Jan. 15, 1892, which directed a judgment in favor of plaintiff, upon a case submitted, under the Code of Civil Procedure (§ 1279).

The questions involved and the facts, so far as material, are stated in the opinion.

Rollin H. Lynde, for appellant. *Henry A. Foster*, for respondent.

O'BRIEN, J. The question in this case is in respect to the plaintiff's rights under a contract made by him with the defendant June 18, 1891, whereby he agreed to sell and the defendant to purchase a parcel of vacant land in the city of New York, at a price specified, subject to but without assuming a mortgage thereon of \$4,000. The plaintiff on his part agreed to convey the premises to the defendant by a full covenant warranty deed, sufficient to vest the title in fee simple free from any lien or encumbrance except the mortgage. At the time stipulated in the contract the plaintiff tendered to the defendant a deed in the required form and containing the proper covenants, which the defendant declined to accept for the reason that upon searching the title he had discovered that there was such an encumbrance upon the land that the plaintiff was unable to convey a good title as required by the contract. The facts were agreed upon and submitted to the General Term under the provisions of § 1279 of the Code, where it was held that no lien or encumbrance, aside from the mortgage, existed or attached to the land by reason of the facts so stated, and directed judgment for the plaintiff that the defendant accept the deed tendered and pay the purchase price. The facts so far as they are material to the point involved are these: On the 18th of October, 1890, the department of parks of the city of New York, under the provisions of chapter 681 of the Laws of 1886, filed a map of a proposed street or avenue which entirely covers the plaintiff's lot. The map so filed complies strictly, with respect to form and substance, with all the provisions of law on the subject. The proposed street has not been opened and no proceedings have been taken to open it or to acquire the title to plaintiff's land by condemnation. Section 677 of the Consolidation Act provides as follows with reference to damages for taking lands for such streets when the same are finally opened: "No compensation shall be allowed for any building, erection, or construction which at any time, subsequent to the filing of the maps, plans, or profiles mentioned in section six hundred and seventy-two of the Act, may be built, erected, or placed in part or in whole upon or through any street, avenue, road, public square, or place exhibited upon such maps, plans, or profiles." The plaintiff's vacant lot derives almost its entire value from the fact that it is possi-

no compensation is allowed for any building, which at any time subsequent to the filing of the maps, may be built in part or in whole upon any street or

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ble to use it for building purposes. The facts, therefore, present two questions.

(1) Whether, assuming the statute to be valid, a lien or encumbrance was created and attached to the land in question by the filing of the map by the park department. (2) Whether the legislature had power under the Constitution to enact, as it virtually did, that whenever land thus exhibited upon the map is taken for street purposes, at any time after the filing thereof, no compensation shall be made to the owner for any improvements put upon the land during the time between the filing of the map and the condemnation proceeding.

An encumbrance is said to import every right to or interest in the land, which may subsist in another, to the diminution of the value of the land, but consistent with the power to pass the fee by a conveyance. (1 Bouvier's Law Dict. p. 696; 2 Greenl. Ev. § 242; 3 Washburn on Real Property, 659, § 14.)

Any right existing in another to use the land or whereby the use by the owner is restricted is an encumbrance within the legal meaning of the term. (*Wetmore v. Bruce*, 118 N. Y. 319.)

It was conceded by the General Term that the public authorities might or might not appropriate the land according to their pleasure, notwithstanding the filing of the map, and further that in case the owner, after the map was filed, made improvements upon it, he did so at the peril of losing the enhanced value of the land resulting therefrom. These propositions seem to be correct, but we are constrained to differ with that court in the conclusion that such a situation does not impair the value of the property and amount to an encumbrance within the meaning of the contract. If the law was valid it virtually imposed a restriction upon the use of the property because it enacted that it could not be used for building purposes, except at the risk to the owner of losing the cost of the building at some time in the future.

We are also constrained to differ with the General Term in regard to the validity of the statute in so far as it enacts that the owner of land exhibited upon the maps is not entitled to compensation for improvements subsequently made. This statute is of somewhat ancient origin, and it was said in some of the cases that it was at first enacted at the solicitation of the land-owners in order to enhance the value of their property. (*In re Furman Street*, 17 Wend. 658; *In re Wall Street*, 17 Barb. 639; *Seaman v. Hicks*, 8 Paige, 660.)

However that may be, in the aspect in which the question is now presented, we think it is in conflict with the provisions of the Constitution for the protection and security of private property. The constitutional guarantees against the appropriation of private property for public use, except upon just compensation, as well as that against depriving the owner of its enjoyment and possession without due process of law, have been the subject of much judicial discussion in the manifold aspects in which the questions have been presented in the numerous cases. These provisions have been so thoroughly expounded,

was unconstitutional and void as it deprived the owners of the free use & enjoyment of property or, at least, so as to affect the value of the land.

and their application, meaning, and practical scope so minutely explained, that it would be very difficult to suggest now any views which could be called new, and a restatement of propositions, so often before sanctioned by courts and judicial writers, is quite needless. This case is governed by a few principles so well settled and understood that they are elementary, and nothing can be added to their force or application by illustration or extended discussion. The validity of a law is to be determined by its purpose and its reasonable and practical effect and operation, though enacted under the guise of some general power, which the legislature may lawfully exercise, but which may be and frequently is used in such a manner as to encroach, by design or otherwise, upon the positive restraints of the Constitution. (What the legislature cannot do directly, it cannot do indirectly) as the Constitution guards as effectually against insidious approaches as an open and direct attack. Whenever a law deprives the owner of the beneficial use and free enjoyment of his property, or imposes restraints upon such use and enjoyment, that materially affect its value, without legal process or compensation, it deprives him of his property within the meaning of the Constitution. All that is beneficial in property arises from its use and the fruits of that use, and whatever deprives a person of them deprives him of all that is desirable or valuable in the title and possession. It is not necessary, in order to render a statute obnoxious to the restraints of the Constitution, that it must in terms or in effect authorize an actual physical taking of the property or the thing itself, so long as it affects its free use and enjoyment, or the power of disposition at the will of the owner. Though the police and other powers of government may sometimes incidentally affect property rights, according to established usages and recognized principles familiar to courts, yet even these powers are not without limitations, as they can be exercised only to promote the public good, and are always subject to judicial scrutiny. (*Wynehamer v. People*, 13 N. Y. 378; *People v. Budd*, 117 Id. 1; *Gilman v. Tucker*, 128 Id. 190; *People ex rel. v. Albertson*, 55 Id. 50; *In re Jacobs*, 98 Id. 98; *People ex rel. v. Otis*, 90 Id. 48; *People v. Gillson*, 109 Id. 389; *Munn v. Illinois*, 94 U. S. 141; *Henderson v. Mayor, etc.*, 92 Id. 259; *Id.* p. 275; *Brimmer v. Reiman*, 138 Id. 78; *Chicago, etc. v. Minnesota*, 134 Id. 418; *Bohan v. Port Jervis G. L. Co.*, 122 N. Y. 18; *Cooley on Con. Lim.* [6th ed.] 207, 670.)

As the plaintiff in the case at bar was virtually deprived of the right to build upon his lot by the statute in question, and as this circumstance obviously impaired its value and interfered with his power of disposition, it was to that extent void as to him, and created no encumbrance upon it. It follows that the judgment of the General Term was correct in its result, though we have not been able to concur in the grounds upon which it was made, and in affirming its action, we have preferred to place our reasons upon other grounds. The judgment should be affirmed. All concur.

Judgment affirmed.

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CHAPTER VII.

TAXATION.

"THE power to impose taxes is one so unlimited in force and so searching in extent, that the courts scarcely venture to declare that it is subject to any restrictions whatever, except such as rest in the discretion of the authority which exercises it. It reaches to every trade or occupation; to every object of industry, use, or enjoyment; to every species of possession; and it imposes a burden which, in case of failure to discharge it, may be followed by seizure and sale or confiscation of property. No attribute of sovereignty is more pervading, and at no point does the power of the government affect more constantly and intimately all the relations of life than through the exactions made under it.

"Taxes are defined to be burdens or charges imposed by the legislative power upon persons or property, to raise money for public purposes. The power to tax rests upon necessity, and is inherent in every sovereignty. The legislature of every free State will possess it under the general grant of legislative power, whether particularly specified in the Constitution among the powers to be exercised by it or not. . . .

"Having thus indicated the extent of the taxing power, it is necessary to add that certain elements are essential in all taxation, and that it will not follow as of course, because the power is so vast, that everything which may be done under pretence of its exercise will leave the citizen without redress, even though there be no conflict with express constitutional inhibitions. Everything that may be done under the name of taxation is not necessarily a tax; and it may happen that an oppressive burden imposed by the government, when it comes to be carefully scrutinized, will prove, instead of a tax, to be an unlawful confiscation of property, unwarranted by any principle of constitutional government." — COOLEY, *Const. Lim.* 6 ed. 587 (1890).¹

In *People v. Com'rs*, 4 Wall. 244, 256 (1866), NELSON, J., for the court, said: "It is known as sound policy that, in every well-regulated

¹ "Primarily, the determination of what is a public purpose belongs to the legislature, and its action is subject to no review or restraint so long as it is not manifestly colorable. All cases of doubt must be solved in favor of the validity of legislative actions, for the obvious reason that the question is legislative, and only becomes judicial when there is a plain excess of legislative authority. A court can only arrest the proceedings, and declare a levy void, when the absence of public interest in the purpose for which the funds are to be raised is so clear and palpable as to be perceptible to any mind at first blush." — COOLEY, *Princ. Const. Law*, 2d ed. 57 (1891). — ED.

impose is often a very troublesome question and difficult for the court to decide.
If a single individual happens to own all the

and enlightened State or government, certain descriptions of property, and also certain institutions — such as churches, hospitals, academies, cemeteries, and the like — are exempt from taxation; but these exemptions have never been regarded as disturbing the rates of taxation, even where the fundamental law had ordained that it should be uniform.”¹

WELLS v. HYATTSVILLE.

MARYLAND COURT OF APPEALS. 1893.

[77 Md. 125.²]

R. Ford Combs, R. W. Hubercorn, and Marion Duckett, for the appellants. *Oscar Wolff, and A. S. Niles* (with whom was *M. R. Levenson*, on the brief), for the appellee.

MCSHERRY, J., delivered the opinion of the court. . . . The adoption by the Board of Commissioners of Hyattsville of what is called the single tax system — that is, a system under which the whole burden of taxation is imposed upon the land, to the total exclusion of buildings, improvements, and personal property — is the proceeding which caused the petitioning tax-payers to make this application to the courts. It is obvious that the questions now brought before us are of more than ordinary interest, and are far from being of mere local importance. Apart from the preliminary inquiry as to whether a correct interpretation of the Act of 1892, ch. 285, warrants the exemption of all buildings and improvements in Hyattsville from municipal taxation; the broader one, involving the power of the legislature under the Declaration of Rights, to impose the whole burden of taxation on one single class of property, to the exclusion of all others, is distinctly presented. . . . The Declaration of Rights, Article fifteen, provides that, “every person in the State, or person holding property therein, ought to contribute his proportion of public taxes for the support of the government, according to his actual worth in real or personal property; yet fines, duties, or taxes may properly or justly be imposed or laid, with a political view for the good government and benefit of the community.” This provision has, with a slight but not material change of phraseology, been a part of the organic law of Maryland for considerably more than a century. Its predominant object is to provide by a fixed enactment equality in taxation, and to prevent, as far as possible, the burden of supporting the government from falling upon some individuals to the exclusion or exemption of others. It prohibits unjust discriminations,

¹ As to the effect of legislative provisions or contracts for future exemption, see *infra*, *Laws Impairing the Obligation of Contracts*. See also 1 Hare, Am. Const. Law, 604, 605; *Picard v. East Tenn., &c., R. R. Co.*, 130 U. S. 637. — ED.

² The statement of facts is omitted. — ED.

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and whilst it remains in force the land-owner, be his possessions large or small, will have an absolute and complete guarantee that public taxes cannot be imposed upon the soil alone. Buildings, improvements, and personal property are, under its terms, as liable to assessment for taxation as land. Its theory is that the distribution of the burden over every class of property alike will lessen the proportion of each individual's contribution, whereby oppressive exactions from the owners of any particular class of property will be impossible. As those who own buildings, improvements, and personal property in any of its various forms — as well intangible as tangible — are equally protected in their possessions and in their natural rights, by the State and local governments, with those who own the land, the support of those governments should place no heavier charge upon the one than on the other class of individuals. This has been the uniform and consistent principle always followed in Maryland. Eminently just in itself as a sound and long-accepted axiom of political economy, it has been incorporated in her organic law since November the third, 1776; it has been upheld by her courts, and steadily and tenaciously adhered to by her conservative people.

But the Act of 1892, not only under the construction placed upon it by the appellee, but palpably by reason of its exemption of all personal property, attempted to overthrow this salutary principle and to disregard the fifteenth article of the Declaration of Rights, and to substitute an experimental, if not a visionary scheme, which if suffered to obtain a foothold will inevitably lead to ruinous consequences. By making no provision for the assessment of personal property in the village of Hyattsville, and by confining the assessment to lands and improvements only, the Act of 1892 undertook to exempt all personal property from municipal taxation; and if the appellee's interpretation of the Act be conceded to be correct, it in like manner authorized the exemption of buildings and improvements. Thus the whole cost of conducting the municipal government in all its departments was attempted to be thrown exclusively upon the land. If the legislature may lawfully do this in the particular instance of Hyattsville, it may do the same thing in the case of a larger and more populous municipality, and likewise with reference to a county; and if as to one county, then, too, as to every county in the State. If the assessed valuations upon buildings and improvements and upon personal property be stricken from the assessment books of the several counties, and the taxes be levied only upon the owners of the land, the burden would speedily become insufferable, and the land would cease to be worth owning. Such a system would eventually destroy individual ownership in the soil, and under the guise of taxation would result in ultimate confiscation.

The wisdom of providing in the organic law against such abuses is obvious, and the provision by which the people of the State are protected against them, embodies a fundamental principle which underlies the American system of taxation.

of the power of making exemptions.

The attempt made by the Act of 1892 to disregard the fifteenth article of the Declaration of Rights by exempting all personal property from assessment must prove abortive, and as the Act undertakes to establish a scheme of taxation not warranted by the organic law, it must be stricken down as null and inoperative.

We are not to be understood as denying to the legislature the power, when State policy and considerations beneficial to the public justify it, to exempt, within reasonable limits, some species of property from taxation. A long-continued practice, nearly contemporaneous in its origin with the adoption of the Constitution itself, and many adjudged and carefully considered cases decided by this court, abundantly support that power. But a power to exempt for reasons and upon considerations which are sufficient to uphold the exemption, is not a power to nullify the Constitution of the State. Under the pretext of granting exemptions, different classes of property cannot be successively stricken from the tax lists, so as to destroy the equality prescribed by the fundamental law, and eventually to reduce the taxable basis to one kind of property alone. Reducing the taxable basis to land by first excluding personal property altogether, and then excepting buildings and improvements, is a perversion and not a legitimate exercise of the conceded authority to make valid exemptions. If this be not so, then the very power to exempt might be carried to the length contended for, and, if carried that far, it would effectually abrogate the fifteenth article of the Declaration of Rights. It is not necessary for the decision of this case, nor would it be appropriate in this proceeding, to determine how far the legislature may lawfully go in granting exemptions from taxation; it is sufficient to observe, that the most latitudinarian construction ever heretofore contended for did not pretend to advance the position assumed by the appellee.

Nor can the Act of 1892 be upheld as one imposing a tax "with a political view," in contradistinction to one levying a tax for the support of the government. Whilst the Declaration of Rights prescribes the rule of equality in levying taxes for the support of the government, it is careful to provide that the legislature shall not be confined to the laying of such taxes alone. Hence it declares: "Yet fines, duties, or taxes may properly and justly be imposed or laid with a political view for the good government and benefit of the community." In other words, notwithstanding every person ought to contribute his just proportion of the public taxes for the support of the government according to his actual worth in real or personal property, still, other duties or taxes of a different kind may be imposed "with a political view" for the good government of the community. *Tyson et al. v. State*, 28 Md. 577.¹

This is not a qualification of the antecedent clause of the fifteenth article. It is an enlargement of the power to tax. The two clauses of the fifteenth article are not alternative, but are cumulative provisions,

¹ This case, in 1868, sustains the validity of statutes, running back to 1844, which tax "collateral inheritances, distributive shares, and legacies."—Ed.

the owners of personalty affected by having the tax on land? Why not, says Hall, lay a small tax on everything and then lay a heavy

for political purposes. view is taken that this is simply an extension of personal property theory of single tax people is that the whole community is taxed fairly by having to pay on land alone. That the tax ultimately devalues itself among all property. But are

and consequently when public taxes are required to be raised for the support of the government, upon a taxable basis fixed by an ascertainment of property valuations, they are imposed according to the standard of equality fixed in the first clause of the article; and this standard cannot be evaded by a mere declaration that the taxes are levied "with a political view," when it is perfectly manifest that they are designed to be levied in the usual way for the support of a municipal government. The assertion that they are taxes of the one sort, when they are palpably taxes of the other class, cannot make them what they are not, nor cause them not to be what they essentially are. Taxes collected for municipal purposes are taxes imposed for the support of government, and are subject to the constitutional prohibition against inequality. *Daly v. Morgan et al.*, 69 Md. 460. But the right to lay other taxes "with a political view" is not identical with a power to exempt all personal property from taxation. The right to impose other taxes is in no sense a power to exempt at all; and this broad exemption is not an exercise of the authority to levy a tax with a political view. The power to exempt is not derived from the second clause of the fifteenth article, relating to the laying of taxes with a political view; and the latter power can never be appealed to as a justification for the use of the former.

In our opinion, then, the Act of 1892, ch. 285, is null and void, because plainly unconstitutional in its unrestricted exemption of personal property from assessment and taxation.

IN *Norwich v. Co. Com'rs of Hampshire*, 13 Pick. 60 (1832), there was a petition for a writ of *mandamus* requiring the defendants to rebuild a bridge, according to the requirements of a statute: SHAW, C. J., drew up the opinion of the court. The ground of objection on the part of the commissioners is, that an Act of legislation, providing that the expense of erecting a particular bridge shall be borne by a county, in whole or in part, when by the operation of the general laws of the Commonwealth, without such legal provision, the expense would be borne wholly by a town, is beyond the just scope of legislative power, and so is unconstitutional and void.

If an Act, purporting to be a statute passed by the legislature, is not warranted by the powers vested in the legislature, it is clear that such Act cannot have the force of law; and that it is the duty of the court so to declare it, whenever it is claimed to be enforced as such. But this is a high and important judicial power, not to be exercised lightly, nor in any case where it cannot be made to appear plainly that the legislature have exceeded their powers. It is always to be presumed, that any Act passed by the legislature is conformable to the Constitution and has the force of law, until the contrary is clearly shown.

In the case before us this is the only question. The provisions of the Act are clear and explicit. It in terms makes it the duty of the county commissioners to cause the bridge in question to be built, provided the

in Commonwealth the expense would be borne wholly by town — is within the just scope of legislative power. Bridges are immediately beneficial to

charge the cost of certain large and expensive
bridges in whole or in part upon counties

expense does not exceed the sum of six hundred dollars, and to charge one-half of the expense thereof upon the county.

Upon consideration, the court are all of opinion that the Act was not unconstitutional. We think it was competent for the legislature, having regard to the singular and peculiar circumstances of a particular town, to provide that a particular bridge should be built partly at the expense of the town, and partly at the expense of the county, within which it is situated. It may happen that a wild, rapid stream, subject to great floods and torrents, passing through a poor, thinly settled town, may require for the public exigency several expensive bridges. It is not contended that the legislature might not, by a general law, provide for charging the expense of such bridges upon counties, or upon the whole State. But suppose there were only one county, or even town, to which such Act of legislation could in its terms apply; it seems difficult to find a valid distinction, that would warrant the legislature to pass an Act, which, though in terms general, could apply to one town or one bridge, and yet that should restrain them from doing the same thing, by naming the particular town or describing the particular bridge. In a question of this description, we must look at the substance of legislative power, not at the mere forms in which it is exercised.

If in any case the legislature can exercise such a power, within the limits prescribed to them by the Constitution, it is to be presumed, in just deference to the authority of a co-ordinate branch of the government, that in any particular case it was done discreetly, and with a just regard to the relative rights and interests of different portions of the community.

It will not throw much light on a question like this, to put extreme cases of the abuse of such a power, to test the existence of the power itself. It is said that the expense of erecting bridges in one section of the Commonwealth, may be charged upon the inhabitants of another; that the inhabitants of Suffolk may be taxed for a bridge in Berkshire. But we think the decision in this case will warrant no such extravagant conclusion. Bridges, though they are designed for public convenience, and for all the citizens of the Commonwealth, yet are more immediately beneficial to those whose local situation is such as to require the more frequent use of them. The people of a town and county where a bridge is situated, have an interest in it, and derive a benefit from it, greater in degree, than the rest of the community, according to their local position, and may therefore, on general principles of justice, be required to contribute a larger share towards its erection and support. The possibility that such a power may be abused, has but a slight tendency to prove that it does not exist. There are a variety of other cases, in which it would be easy to suggest a possible gross abuse of legislative powers, but in which there can be no possible question of the existence of the power itself, under the express provisions of the Constitution. . . .

And there is another circumstance which, we think, rescues this Act from the charge of violent innovation; it is, that it has been the prac-

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the, from the earliest times, to charge the cost of certain large and expensive bridges, in whole or in part, upon counties; and it is impossible to deny the equity of these provisions.

The court are of opinion, that the Act in question was not unconstitutional; that it is a valid and binding law, which the commissioners are bound to carry into effect, according to its terms.

A writ of mandamus in the alternative ordered.

In *People v. Flagg*, 46 N. Y. 401, 404 (1871), in sustaining a law which authorized the building of certain roads by two towns, and required the issuing and sale of town bonds to pay therefor, CHURCH, C. J., for the court, said: "The legislation involved in this case is challenged upon the ground that it is not competent for the legislature to compel the town of Yonkers to incur a debt for the improvements authorized to be made. It is conceded that the legislature could direct the improvements to be made, and could lawfully impose a tax upon the property of the citizens of the town to pay the necessary expenses, or that it might authorize a town debt to be created, with the consent of the people of the town, or some officer or officers representing the municipality; but that it cannot directly compel the creation of the debt, without the consent of the citizens or town authorities.

"All legislative power is conferred upon the Senate and Assembly; and if an Act is within the legitimate exercise of that power, it is valid, unless some restriction or limitation can be found in the Constitution itself. The distinction between the United States Constitution, and our State Constitution is, that the former confers upon Congress certain specified powers only, while the latter confers upon the legislature all legislative power. In the one case the powers specifically granted can only be exercised. In the other, all legislative powers not prohibited may be exercised. It cannot be denied, that the subject of the laws in question is within legislative powers. The making and improvement of public highways, and the imposition and collection of taxes, are among the ordinary subjects of legislation. The towns of the State possess such powers as the legislature confers upon them. They are a part of the machinery of the State government, and perform important municipal functions, which are regulated and controlled by the legislature. Private property cannot be taken for public use without compensation. But this principle does not interfere with the right of taxation for proper purposes. The legislature, in substance, directed certain highways to be made and constructed in the town of Yonkers, and imposed a tax upon the town to pay the expenses of the work, but to prevent too large a tax at one time, it directed bonds to be given, payable at different periods, so that no more than a limited sum should become due at one time.

"The bonds to be given are town bonds; they are to be issued by town officers, and the tax to pay them is imposed upon the property of the town. { If the legislature may authorize the town to incur this debt,

the legislature to enact. The purpose was a public one. The motives of the legislature for doing a public

why may it not direct it to be done? > As a question of power, I am unable to find any restriction in the Constitution. It is not within the judicial province to correct all legislative abuses.

"That local expenditures and improvements should, in general, be left to the discretion of those immediately interested, is manifestly just, and is in accordance with the theory of our government. But when power is conceded, we have no right to inquire into the motives or reasons for doing the particular act.

"The legislation in question is open to serious criticism. It compels a large, if not extravagant expenditure of money, and imposes onerous burdens upon the people without their consent. If the object of the expenditure was private, or if the money to be raised was directed to be paid to a private corporation, who were authorized to use the improvements for private gain, the question, in my judgment, would be quite different; and in this respect there is a limit, beyond which legislative power cannot legitimately be exercised. But the defendants cannot avail themselves of this principle. Here the purpose is confessedly public, and the taxing power for such purposes is restrained only by restrictive provisions, and whether a tax shall be imposed for the whole expenditure in one year, or spread over a series of years; and in the mean time the obligations of the town, given on matters of detail and discretion, which do not affect the power, and with which courts cannot interfere."

KELLY v. PITTSBURGH.

SUPREME COURT OF THE UNITED STATES. 1881.

[104 U. S. 78.]

ERROR to the Supreme Court of the State of Pennsylvania.

The facts are stated in the opinion of the court.

Mr. Daniel Agnew and Mr. Albert N. Sutton, for the plaintiff in error. Mr. George Shiras, Jr., contra.

MR. JUSTICE MILLER delivered the opinion of the court.

The plaintiff in error, James Kelly, is the owner of eighty acres of land, which, prior to the year 1867, was a part of the township of Collins, in the county of Alleghany and State of Pennsylvania. In that year the legislature passed an Act by virtue of which, and the subsequent proceedings under it, this township became a part of the city of Pittsburgh. The authorities of the city assessed the land for the taxes of the year 1874 at a sum which he asserts is enormously beyond its value, and almost destructive of his interest in the property. They are divisible into two classes; namely, those assessed for State and county pur-

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assessment to a board of revision; then brought suit
in the Supreme Court to restrain the collection of the tax

poses by the county of Alleghany, within which Pittsburgh is situated, and those assessed by the city for city purposes.

Kelly took an appeal, allowed by the laws of Pennsylvania, from the original assessment of taxes, to a board of revision, but with what success does not distinctly appear. The result, however, was unsatisfactory to him, and he brought suit in the Court of Common Pleas to restrain the city from collecting the tax. That court dismissed the bill, and the decree having been affirmed on appeal by the Supreme Court, he sued out this writ of error.

The transcript of the record is accompanied by seven assignments of error. All of them except two have reference to matters of which this court has no jurisdiction. Those two, however, assail the decree on the ground that it violates rights guaranteed by the Constitution of the United States. As the same points were relied on in the Supreme Court of the State, it becomes our duty to inquire whether they are well founded. They are as follows:—

First, The Supreme Court of Pennsylvania erred in sustaining the authority of the city of Pittsburgh to assess and collect taxes from complainant's farm-lands for municipal or city purposes, such exercise of the taxing power being a violation of rights guaranteed to him by article 5 of amendments to the Constitution of the United States.

Second, The Supreme Court of Pennsylvania erred in sustaining the authority of the city of Pittsburgh to assess and collect taxes from complainant's farm-lands for municipal or city purposes, such exercise of the taxing power being a violation of rights guaranteed to him by art. 14, sect. 1, of the amendments to the Constitution of the United States.

As regards the effect of the Fifth Amendment of the Constitution, it has always been held to be a restriction upon the powers of the Federal government, and to have no reference to the exercise of such powers by the State governments. See *Withers v. Buckley*, 20 How. 84; *Davidson v. New Orleans*, 96 U. S. 97. We need, therefore, give the first assignment no further consideration. But this is not material, as the provision of sect. 1, art. 14, of the amendments relied on in the second assignment contains a prohibition on the power of the States in language almost identical with that of the Fifth Amendment. That language is that "no State shall . . . deprive any person of life, liberty, or property without due process of law."

The main argument for the plaintiff in error — the only one to which we can listen — is that the proceeding in regard to the taxes assessed on his land deprives him of his property without due process of law.

It is not asserted that in the methods by which the value of his land was ascertained for the purpose of this taxation there was any departure from the usual modes of assessment, nor that the manner of apportioning and collecting the tax was unusual or materially different from that in force in all communities where land is subject to taxation. In these respects there is no charge that the method pursued is not due

It can not be said judicially that p^{ro}p. received benefit from the city organization. However great

process of law. Taxes have not, as a general rule, in this country since its independence, nor in England before that time, been collected by regular judicial proceedings. The necessities of government, the nature of the duty to be performed, and the customary usages of the people, have established a different procedure, which, in regard to that matter, is, and always has been, due process of law.

The tax in question was assessed, and the proper officers were proceeding to collect it in this way.

The distinct ground on which this provision of the Constitution of the United States is invoked is, that as the land in question is, and always has been, used as farm-land, for agricultural use only, subjecting it to taxation for ordinary city purposes deprives the plaintiff in error of his property without due process of law. It is alleged, and probably with truth, that the estimate of the value of the land for taxation is very greatly in excess of its true value. Whether this be true or not we cannot here inquire. We have so often decided that we cannot review and correct the errors and mistakes of the State tribunals on that subject, that it is only necessary to refer to those decisions without a restatement of the argument on which they rest. *State Railroad Tax Cases*, 92 U. S. 575; *Kennard v. Louisiana*, Id. 480; *Davidson v. New Orleans*, 96 Id. 97; *Kirtland v. Hotchkiss*, 100 Id. 491; *Missouri v. Lewis*, 101 Id. 22; *National Bank v. Kimball*, 103 Id. 732.

But, passing from the question of the administration of the law of Pennsylvania by her authorities, the argument is, that in the matter already mentioned the law itself is in conflict with the Constitution.

It is not denied that the legislature could rightfully enlarge the boundary of the city of Pittsburgh so as to include the land. If this power were denied, we are unable to see how such denial could be sustained. What portion of a State shall be within the limits of a city and be governed by its authorities and its laws has always been considered to be a proper subject of legislation. How thickly or how sparsely the territory within a city must be settled is one of the matters within legislative discretion. Whether territory shall be governed for local purposes by a county, a city, or a township organization, is one of the most usual and ordinary subjects of State legislation.

It is urged, however, with much force, that land of this character, which its owner has not laid off into town lots, but insists on using for agricultural purposes, and through which no streets are run or used, cannot be, even by the legislature, subjected to the taxes of a city, — the water tax, the gas tax, the street tax, and others of similar character. The reason for this is said to be that such taxes are for the benefit of those in a city who own property within the limits of such improvements, and who use or might use them if they choose, while he reaps no such benefit. Cases are cited from the higher courts of Kentucky and Iowa where this principle is asserted, and where those courts have held that farm-lands in a city are not subject to the ordinary

city taxes. It is no part of our duty to inquire into the grounds on which those courts have so decided. They are questions which arise between the citizens of those States and their own city authorities, and afford no rule for construing the Constitution of the United States.

We are also referred to the case of *Loan Association v. Topeka* (20 Wall. 655), which asserts the doctrine that taxation, though sanctioned by State statutes, if it be [not] for a public use, is an unauthorized taking of private property.

We are unable to see that the taxes levied on this property were not for a public use. Taxes for schools, for the support of the poor, for protection against fire, and for water-works, are the specific taxes found in the list complained of. We think it will not be denied by any one that these are public purposes in which the whole community have an interest, and for which, by common consent, property owners everywhere in this country are taxed.

There are items styled city tax and city buildings, which, in the absence of any explanation, we must suppose to be for the good government of the city, and for the construction of such buildings as are necessary for municipal purposes. Surely these are all public purposes; and the money so to be raised is for public use. No item of the tax assessed against the plaintiff in error is pointed out as intended for any other than a public use.

It may be true that he does not receive the same amount of benefit from some or any of these taxes as do citizens living in the heart of the city. It probably is true, from the evidence found in this record, that his tax bears a very unjust relation to the benefits received as compared with its amount. But who can adjust with precise accuracy the amount which each individual in an organized civil community shall contribute to sustain it, or can insure in this respect absolute equality of burdens, and fairness in their distribution among those who must bear them?

We cannot say judicially that Kelly received no benefit from the city organization. These streets, if they do not penetrate his farm, lead to it. The water-works will probably reach him some day, and may be near enough to him now to serve him on some occasion. The schools may receive his children, and in this regard he can be in no worse condition than those living in the city who have no children, and yet who pay for the support of the schools. Every man in a county, a town, a city, or a State is deeply interested in the education of the children of the community, because his peace and quiet, his happiness and prosperity, are largely dependent upon the intelligence and moral training which it is the object of public schools to supply to the children of his neighbors and associates, if he has none himself.

The officers whose duty it is to punish and prevent crime are paid out of the taxes. Has he no interest in maintaining them, because he lives further from the court-house and police-station than some others?

Clearly, however, these are matters of detail within the discretion,

and therefore the power, of the law-making body within whose jurisdiction the parties live. This court cannot say in such cases, however great the hardship or unequal the burden, that the tax collected for such purposes is taking the property of the tax-payer without due process of law.

These views have heretofore been announced by this court in the cases which we have cited, and in *McMillen v. Anderson*, 95 U. S. 37.

In *Davidson v. New Orleans*, *supra*, the whole of this subject was very fully considered, and we think it is decisive of the one before us.

*Judgment affirmed.*¹

¹ Compare *Erie v. Reed's Ex'rs*, 113 Pa. 468. As to the summary procedure that is valid in taxation, see *Murray v. Hoboken Land Co.*, 18 How. 272; s. c. *supra*, p. 600, and compare *Davidson v. N. O.*, 96 U. S. 97; s. c. *supra*, p. 610; *Auffmordt v. Hedden*, 137 U. S. 310, 323; *State Railroad Tax Cases*, 92 U. S. 575.

Compare, on a like question, *Morford v. Unger*, 8 Iowa, 82 (1859). STOCKTON, J., for the court: "The only question to be considered in this case is, whether the Act of the Legislature of Iowa, approved July 14, 1856, entitled 'An Act to amend the Act to incorporate the city of Muscatine' is constitutional. By this Act, it is conceded the limits of the city of Muscatine were extended about one mile on the east, and about two miles on the north and west, beyond its former boundary. The plaintiff lived upon the territory brought into the city by the Act aforesaid, upon land used exclusively for farming purposes, about one mile from the old city limits, and about the same distance from any lands laid out into city or town lots, or used as city property. His land, so used, was taxed by the city at the sum of one dollar per acre. This tax he refused to pay; and his property being distrained for the payment thereof, he brought this action of replevin, to test the constitutionality of the Act extending the limits of the city. . . .

"The question where the proper line is to be drawn between the legitimate exercise of the taxing power and an arbitrary appropriation of the property of an individual under the mask of this power, is discussed at length by Marshall, C. J., in *Cheaney v. Hooser*, 9 B. Monroe, 330; and it is held by the court, that where there is no other constitutional restriction upon the power of taxation, securing equality and uniformity in the distribution of taxation, either general or local, the provision of the Constitution which prohibits the taking of private property for public use without just compensation, furnishes the only available safeguard against legislation, which, in its operation, may result in the appropriation of the property of one for the benefit of many.

"Conceding to the General Assembly a wide range of discretion as to the objects of taxation, the kind of property to be made liable, and the extent of territory within which the local tax may operate, it is argued, in the opinion referred to, that there must be some limit to this legislative discretion; which, in the absence of any other criterion, is held to consist in the discrimination to be made, between what may reasonably be deemed a tax, for which a just compensation is provided in the objects to which it is to be devoted, and that which is palpably not a tax, but which, under the form of a tax, is the taking of private property for public use, without just compensation. If there be such a flagrant and palpable departure from equity, in the burden imposed; if it be imposed for the benefit of others, or for purposes in which those objecting have no interest, and are, therefore, not bound to contribute, it is no matter in what form the power is exercised — whether in the unequal levy of the tax, or in the regulation of the boundaries of the local government, which results in subjecting the party unjustly to local taxes, it must be regarded as coming within the prohibition of the Constitution designed to protect private rights against aggression, however made, and whether under the color of recognized power or not.

"It is urged by the plaintiff, that his farm, which is sought to be brought within

the jurisdiction of the city, is agricultural land; that it is one mile from the old boundary of the city, and the same distance from any lands laid out into city lots, or used or needed for city purposes; that he can derive no benefit from the extension of the municipal government over him and his property; and that the Act subjecting him to taxation at the will of the city council, and for its benefit, is an appropriation of his private property for the use of the city, without any compensation or benefit accruing to him in return.

"We have no doubt, as is held in *Cheaney v. Hooser*, *supra*, that if the owner of land adjoining a city or town should lay the same off into lots, and invite purchasers and settlers to occupy it with dwellings or otherwise, he could not object to a law extending the authority of the local government over him and his land so laid out and occupied. But if the case is that of vacant land, or a cultivated farm, occupied by the owner for agricultural purposes, and not required for either streets or houses, or other purposes of a town, and solely for the purpose of increasing its revenue, it is brought within the taxing power, by an enlargement of the city limits, such an Act, though on its face providing only for such extension of the city limits, is in reality nothing more than authority to the city to tax the land to a certain distance outside of its limits; and is, in effect, the taking of private property without compensation. The force and effect and obvious intent of the Act is, to subject such outside lands to city taxation, without the pretext of extending the protection of the city over them, and when the power of the legislature over local regulations and government furnishes no legitimate basis for the Act.

"In *Wells v. City of Weston*, 22 Missouri, 385, the Supreme Court of Missouri, while conceding to the legislature the uncontrolled power of taxation, subject only to the constitutional restriction, that 'all property subject to taxation shall be taxed in proportion to its value;' and conceding, also, the right to delegate to subordinate agencies, such as municipal corporations, the power of taxation, have denied to it the power to tax arbitrarily the property of one citizen and give it to another; and on this ground have held, that the legislature cannot authorize a municipal corporation to tax, for its own local purposes, land lying beyond the corporation limits.

"And so it is held by the Court of Appeals of Kentucky, in conformity with the principles laid down in *Cheaney v. Hooser*, *supra*, that although the legislature has power to extend the limits of cities and towns, and include adjacent agricultural lands, without the consent of the owner, yet the corporation authorities cannot tax such property as town property, and subject it to the city burdens, without the consent of the owner, until it shall be laid off into lots and used as town property. The decision is made distinctly on the ground that the Act of the Legislature was an invasion of private property, contrary to the principles of our constitutional law, under color of the power of taxation. *City of Covington v. Southgate*, 15 B. Monroe, 491. . . .

"The extension of the limits of a city or town, so as to include its actual enlargement, as manifested by houses and population, is to be deemed a legitimate exercise of legislative power. An indefinite or unreasonable extension, so as to embrace lands and farms at a distance from the local government, does not rest upon the same authority. And although it may be a delicate, as well as a difficult, duty for the judiciary to interpose, we have no doubt but strictly there are limits beyond which the legislative discretion cannot go. It is not every case of injustice or oppression which may be reached; and it is not every case which will authorize a judicial tribunal to inquire into the minute operation of laws imposing taxes, or defining the boundaries of local jurisdictions. The extension of the limits of the local authority may in some cases be greater than is necessary to include the adjacent population, or territory laid out into city lots, without a case being presented, in which the courts would be called upon to apply a nice or exact scrutiny as to its practical operation. It must be a case of flagrant injustice and palpable wrong, amounting to the taking of private property, without such compensation in return as the tax-payer is at liberty to consider a fair equivalent for the tax.

"In the case of *City of Covington v. Southgate*, 15 B. Monroe, 498, it was held by the court, that as Southgate had made no town upon his land, and desired none; and

WEIMER v. BUNBURY.¹SUPREME COURT OF MICHIGAN. 1874. *2 vol. 1874*

[30 Mich. 201.]

[BUNBURY brought trespass for taking and carrying away his goods. Plea, the general issue; giving notice of certain facts in justification, to the effect that the said plaintiff, being treasurer of a city, made default in collecting and paying over taxes to Hess, the county treasurer; that Hess, under color of a statute, issued a warrant to the defendant Weimer, reciting this default and the amount thereof, and directing him to collect the said sum from the estate of the plaintiff; and that Weimer acted by virtue of this warrant. At the trial the plaintiff objected to the defendant's offer of proof, on the ground, among others, that the statute alleged as authorizing the warrant was unconstitu-

as there appeared no legitimate necessity to justify the extension of the city boundary, without his consent, it presented a case of taxation for the benefit of others, and was under the color of taxation, an appropriation of private property without compensation. We think the case made by the present plaintiff is quite as strong as the one cited. His land is situated too far from the city of Muscatine to be deemed, in any just sense, a part of it. He does not desire to lay it off into city lots, but desires to use it as farming land. It is idle to say that the protection afforded by the city authority, or the privilege of voting at the city elections, furnishes a just equivalent for the burdens imposed upon him in the shape of taxes, by the city; and the attempt to extend its jurisdiction over him and his property must be regarded as an attempt to take private property for public use, and within the prohibitory clause of the Constitution.

"The restriction in the fifth section of the Act, 'that the lands lying within the territory brought into the city, not laid out into lots and out-lots, shall not be assessed or taxed otherwise than by the acre, according to its value for agricultural, horticultural, mining, and other purposes,' does not relieve the Act of its objectionable features, or strengthen, in any degree, the case of the defendant. It would seem to indicate, on the other hand, that the city was seeking to bring within its power, for the purpose of taxation, land used for farming purposes, and not needed for city lots, without any expectation of rendering a just equivalent for the burdens it designed to impose. The difficulty is in no manner obviated by the suggestion, that the city only proposes to tax the land of the plaintiff by the acre, as agricultural lands, and not as city lots. It can make little difference to the plaintiff in what manner his property is taxed. Whether as city lots, or by the acre, as agricultural land. It is the power to tax in any shape to which he objects. It might as well be attempted to call the tax itself by some less objectionable name.

Judgment reversed."

In *Fulton v. Davenport*, 17 Iowa, 404 (1864), the court (LOWE, J.), upon a referee's detailed report as to the situation of the lot in question, and its relation to the city proper, undertakes to lay down a working rule. Compare *Bradshaw v. Omaha*, 1 Neb. 16, a case of the same sort, where the court make a similar attempt to lay down a rule.

See Cooley, Const. Lim. 6th ed. 616, n. 3: "It would seem as if there must be great practical difficulties — if not some of principle — in making this disposition of such a case." — Ed.

¹ *Spencer v. Merchant*, *supra*, p. 647, may well be examined at this point. — Ed.

*Similar to
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tional, as depriving the defendant of his property without due process of law. Verdict and judgment for the defendants.]

Error to Berrien Circuit. *Edward Bacon* and *C. I. Walker*, for plaintiff in error. *E. M. Plimpton* and *D. Darwin Hughes*, for defendant in error.

COOLEY, J.¹ . . . The position taken by the defendant in error is, that the words "due process of law," made use of in the section of the constitution last referred to, imply, in the words of Judge Bronson, "a prosecution or suit, instituted and conducted according to the pre-

¹ The following passage of the opinion, from what is here omitted, may be inserted as a note:—

"Under our revenue system, the supervisors of townships and cities make an annual assessment of persons and property for the purposes of taxation. The auditor-general apportions the State tax among the counties, and transmits notice of the apportionment to the clerks of the boards of supervisors respectively. Comp. L., § 996. The supervisors determine the amount of county taxes, and apportion State and county taxes among the townships. Ib., § 997. The clerk of the board makes two certificates of the amount apportioned to each township and ward, one of which he delivers to the county treasurer, and the other to the proper supervisor. Ib., § 998. The supervisor proceeds to levy the taxes specified in the certificate, Ib., § 999; and on or before November 15, notifies the township or ward treasurer of the amount, who must, on or before the 25th of November, give bond to the county treasurer, and his successors in office, with sureties, conditioned that he shall duly and faithfully perform the duties of his office. Ib., § 1000. For this bond the county treasurer gives a receipt, Ib., § 1001; which is presented to the supervisor, who thereupon delivers to the township treasurer a copy of the assessment roll, with the taxes all extended thereon, including not only the State and county, but also all township, school, highway and special taxes, and with a warrant attached, which shall specify particularly the several amounts and purposes for which said taxes are to be paid into the county and township treasuries, respectively. Ib., § 1002. This warrant is to be under the hand of the supervisor, commanding the treasurer to collect from the several persons named in the roll the sums assessed against them, and to retain in his hands the amount receivable by law into the township treasury for the purposes therein specified, and to account for and pay over to the county treasurer the amounts therein specified for State and county purposes, on or before the first day of February then next; and it is to authorize the treasurer, in case any person named in the assessment roll shall neglect or refuse to pay his tax, to levy the same by distress and sale of his goods and chattels. Ib., § 1003. The township treasurer must, 'within one week after the time specified in his warrant for paying the money directed to be paid to the county treasurer, pay to such county treasurer the sum required in his warrant, either in delinquent taxes or in funds then receivable by law.' Ib., § 1018. The provision under which the county treasurer issued the process now in question, is as follows: 'If any township treasurer, ward collector, or other collecting officer shall neglect or refuse to pay to the county treasurer the sums required by his warrant, or to account for the same as unpaid, as required by law, the county treasurer shall, within ten days after the time when such payment ought to have been made, issue a warrant under his hand, directed to the sheriff of the county, commanding him to levy such sum as shall remain unpaid and unaccounted for, together with his fees for collecting the same, of the goods and chattels, lands and tenements of such township treasurer, ward collector, or other collecting officer, and their sureties, and to pay the said sums to such county treasurer, and return such warrant within forty days from the date thereof.' Ib., § 1029.

"It is, perhaps, not necessary to notice statutes further, except to say that under the charter of the city of Niles there are no ward collectors or treasurers, but the duty of collecting for the whole city is devolved upon the treasurer of the city."—Ed.

scribed forms and solemnities for ascertaining guilt or determining the title of property." *Taylor v. Porter*, 4 Hill, 147. In this case there has been no prosecution or suit; the county treasurer has adjudged the case without a hearing, and issued final process to seize property in enforcement of his conclusion. Such summary process, it is said, which gives the party whose property is seized no opportunity to contest the claim set up against him, cannot be due process of law.

There is nothing in these words, however, that necessarily implies that due process of law must be judicial process. Much of the process by means of which the government is carried on and the order of society maintained is purely executive or administrative. Temporary deprivations of liberty or property must often take place through the action of ministerial or executive officers or functionaries, or even of private parties, where it has never been supposed that the common law would afford redress. One in whose presence a felony is committed is in duty bound to restrain the offender of his liberty without waiting for the issue of a magistrate's warrant, — 4 Bl. Com. 292-3; and the traveller who finds the public way foundrous crosses the adjacent field without fear of legal consequences. *Holmes v. Seeley*, 19 Wend. 507; *Campbell v. Race*, 7 Cush. 408. Our laws for the exercise of the right of eminent domain protect parties in going upon private grounds for the preliminary examinations and surveys. It may be said that in none of these cases is the deprivation final or permanent, but that is immaterial. The constitution is as clearly violated when the citizen is unlawfully deprived of his liberty or property for a single hour, as when it is taken away altogether. Estrays were at the common law taken up and disposed of without judicial proceedings, — 1 Bl. Com. 297; and our statutes have always made provisions under which, if they were complied with, the owner of stray beasts might be deprived of his ownership by *ex parte* proceedings not of a judicial character. Where an individual creates with his property a public or private nuisance, the common law permits the citizen who suffers from it to become "his own avenger, or to minister redress to himself," — 3 Bl. Com. 5, 6; and he may even destroy the property if necessary to the removal of the nuisance. *Rung v. Shoneberger*, 2 Watts, 23; *Inhabitants of Arundel v. McCulloch*, 10 Mass. 70; *Wetmore v. Tracy*, 14 Wend., 250. The destruction by the act of the party is as lawful as if it had been preceded by a judgment of a competent court, the only difference being that the party when called upon to justify the act must in the one case prove the facts warranting it, while in the other he would be protected by the judgment. No one probably would dispute the levy of distress by a private individual being due process of law in the cases in which the law permits it. 3 Bl. Com. 6. It is true that the party whose property has been distrained may contest the proceedings by suit in the common-law courts, but he fails if they prove to have been regular. The military law affords abundant illustration on this point. The principles on which it is administered have but little in common with those which control

judicial investigations, and the process under which men are restrained of their liberty under it is sometimes very summary and even arbitrary. But this law is just as much subject to the constitutional inhibitions as is the code of civil remedies. See *Ex parte Milligan*, 4 Wall. 2. But the proceedings for the levy and collection of the public revenue afford still better illustration. Almost universally these are conducted without judicial forms, and without the intervention of the judicial authority; the few cases in which statutes have required the action of courts being exceptional. Where such action is not required, the proceedings are regarded as purely administrative, and any hearing allowed to parties in their progress has not been in the nature of a trial, but as a means of enlightening the revenue officers upon the facts which should govern their action. This has been so from time immemorial, and it has never been supposed that the taxpayer had a constitutional right to resist the tax because he had never had any judgment against him on a judicial hearing to fix its amount.

There are, unquestionably, cases in which expressions have been used implying the necessity for a common-law trial before, in any instance, a man can be deprived of his property; but they will be found on investigation to be cases calling for no such sweeping statement. If any court has ever decided that judicial proceedings are of constitutional necessity in appropriating property under the power of taxation, the case has not been brought to our attention, and has been overlooked in our investigations. This would be most extraordinary if the necessity existed, for tax systems similar to our own have prevailed ever since our government was founded, and it cannot be said that tax laws are usually so popular as to disarm every person of any legal objections which he might suppose available to relieve him of their burdens. On the contrary, no laws are contested more vigorously, and with none are people more critical in looking after defects and infirmities. It may be safely asserted, without fear of contradiction, that if the collection of the revenue could only be made through legal proceedings, the true principle would not have been left to so late a discovery, but the wheels of government would long ago have been blocked by litigious parties until an entirely new system could be substituted. And it need hardly be said that any new system in which courts should be made the administrators of the revenue would necessarily be so cumbrous, and so subject to impediments and delays, as to make a constitutional provision requiring it a great public inconvenience.

There is nothing technical, or, we think, obscure, in the requirement that process which divests property shall be due process of law. The constitution makes no attempt to define such process, but assumes that custom and law have already settled what it is. Even in judicial proceedings we do not ascertain from the constitution what is lawful process, but we test their action by principles which were before the constitution, and the benefit of which we assume that the constitution was intended to perpetuate. If there existed, before that instrument

was adopted, well-known administrative proceedings which, having their origin in a legislative conviction of their necessity, had been sanctioned by long and general acceptance, we are no more at liberty to infer an intent in the people to prohibit them by implication from any general language, than we should be to infer an intent to abridge the judicial authority by the use of similar words. The truth is, the bills of rights in the American constitutions have not been drafted for the introduction of new law, but to secure old principles against abrogation or violation. They are conservatory instruments rather than reformatory; and they assume that the existing principles of the common law are ample for the protection of individual rights, when once incorporated in the fundamental law, and thus secured against violation.

We are, therefore, of necessity, driven to an examination of the previous condition of things, if we would understand the meaning of due process of law, as the constitution employs the term. Nothing previously in use, regarded as necessary in government and sanctioned by usage, can be looked upon as condemned by it. Administrative process of the customary sort is as much due process of law as judicial process. We should meet a great many unexpected and very serious embarrassments in government if this were otherwise. The words, it has very justly been said, "were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice." Per Johnson, J., in *Bank of Columbia v. Okely*, 4 Wheat. 235. It has been said, with special reference to process for the collection of taxes, that "any legal process which was originally founded in necessity, has been consecrated by time, and approved and acquiesced in by universal consent, must be considered an exception to the right of trial by jury, and is embraced in the alternative 'law of the land.'" *State v. Allen*, 2 McCord, 56. In *High v. Shoemaker*, 22 Cal. 363, the same doctrine was held in a revenue case. In *Rockwell v. Nearing*, 35 N. Y. 308, which is quoted for defendant in error as sustaining his position, the opposite view is very distinctly taken. "There are," says Porter, J., "many examples of summary proceedings which were recognized as due process of law at the date of the constitution, and to these the prohibition has no application." Yet the same judge, in a previous portion of his opinion, had quoted with approval the general language of other cases, which might be understood as implying the necessity of a judicial hearing to due process of law; and the case is an illustration of the danger of deducing general principles to govern one class of cases, from isolated expressions made use of in deciding another class. A day in court is a matter of right in judicial proceedings, but administrative proceedings rest upon different principles. The party affected by them may always test their validity by a suit instituted for the purpose, and this is supposed to give him ample protection. To require that the action of the government, in every instance where it touches the right of the individual citizen, shall be preceded by a

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judicial order or sentence after a hearing, would be to give to the judiciary a supremacy in the State, and seriously to impair and impede the efficiency of executive action.

But it may be argued that the warrant in question is not a necessary or usual process under revenue laws. It cannot be said, however, that summary process to enforce payment by a defaulting collector is very unusual. The Territorial Act of 1833 required the auditor to report such a defaulter to the governor, and unless he settled up and paid all arrearages within thirty days after the report, he was to be removed from office. Code of 1833, p. 169. In the Revised Statutes of 1838, p. 87, § 12, the provision was introduced for the issue, by the county treasurer, of a warrant to the sheriff in the nature of an execution against the collector. This provision had been in force for twelve years before the present constitution was proposed, and we are not informed that its validity had ever been questioned. Similar statutes had existed in other States. In Massachusetts and New York, from which we derived the larger portion of our statutes, they had been in force for a period dating back of the organization of our State government; and in neither State does it seem to have been disputed, that such summary process was "due process of law." The legislature of this State, by providing for it in repeated enactments, have shown their conviction of its necessity; and the constitutional convention, though they made several express provisions to insure justice and equality in matters of taxation, passed this legislation by in silence. We think, therefore, that summary process to enforce payment by a delinquent collector cannot be held forbidden. . . .

The circuit judge held the statute constitutional, but that plaintiff in error was not justified by its provisions. If he was right in this, any consideration of the constitutional question might have been waived, upon the ground that a legislative act should not be declared unconstitutional unless the point is presented in such form as to render its decision imperative. *Ex parte Randolph*, 2 Brock. 447; *Frees v. Ford*, 6 N. Y. 177; *Hoover v. Wood*, 9 Ind. 287; *Mobile & Ohio R. R. Co. v. State*, 29 Ala. 573. It is not imperative, so long as it appears that the case can be disposed of in only one way, whether the law is held valid or not. But as the general principle of this statute has always been deemed important in this State, we have thought it proper to express our opinion of its constitutional validity, pausing only when we reach a provision which seems defective in its protection of individual rights, and which, whether constitutional or not, it may fairly be presumed the legislature might be inclined to modify on their attention being called to it. (Waiving, therefore, the question of the validity of this provision, we proceed to show why, in our opinion, the county treasurer's warrant was not justified by its terms.) . . .

The judgment must be affirmed, with costs.

The other Justices concurred.

What was
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done?

HOOPER v. EMERY ET AL.

SUPREME JUDICIAL COURT OF MAINE. 1837.

[14 Me. 375.]

THE case came before the court on a statement of facts, which sufficiently appear in the opinion of the court. There was a brief argument by *Fairfield* and *Haines*, for the plaintiff, and by *A. G. Goodwin*, for the defendants.

The opinion of the court was drawn up, and delivered the week following, at the adjourned term in Cumberland, by

SHEPLEY, J. This is an action of *assumpsit*, brought to recover a sum of money alleged to be due from the defendants to the plaintiff. The facts are agreed; and from the agreement of the parties it appears, that at a legal meeting of the inhabitants of the town of Biddeford, qualified to vote in town affairs, on the fourth day of April, 1837, a vote was passed to receive the money apportioned to the town under the Act of the eighth of March, 1837, c. 265, entitled "An Act providing for the Disposition and Repayment of the Public Money, apportioned to the State of Maine, on Deposit, by the Government of the United States." And the defendants were chosen trustees to receive and "appropriate it." At the same meeting, a vote was passed, that the money so received should "be divided among the inhabitants of the town according to families." The defendants, before the commencement of this suit, received the money apportioned to the town of Biddeford; and on demand being made by the plaintiff, an inhabitant of said town and having a family, they refused to pay to him any portion thereof, assigning as a reason, "that the town could not legally make such a disposition of it."

If the plaintiff is entitled to recover anything, the amount to be recovered is agreed. The parties agree, also, to waive all objections to the form of the process and mode of proceeding; and judgment is to be rendered according to the rights of the parties. . . .

This State had the right to prescribe the conditions upon which the municipal corporations should receive the money, and to define and limit their powers in relation to the use and employment of it. This has been done by the enactments before recited; and these corporations have no power over it, not derived from the provisions of the Act of the eighth of March.

"The inhabitants of every town in this State are declared to be a body politic and corporate" by the statute; but these corporations derive none of their powers from, nor are any duties imposed upon them by, the common law. They have been denominated *quasi* corporations, and their whole capacities, powers, and duties are derived from legislative enactments. They cannot therefore appropriate this money in any other manner than is provided in the Act of the 8th of March.

of the town the defts; trustees appointed to receive the money refused to pay it over on the ground that the town could not legally make such a disposition of it.

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The manner in which it can be appropriated is clearly pointed out in the clause "that any city, town, or organized plantation is hereby authorized to appropriate its portion of the surplus revenue, or any part thereof, for the same purposes, that they have a right to any moneys accruing from taxation; also, to loan the same in such manner as they deem expedient, on receiving safe and ample security therefor." . . .

Whether the town could legally divide it among the inhabitants "according to families," is the direct question for consideration. And it is to be determined by ascertaining, whether they can so appropriate "moneys accruing in the treasury from taxation;" because it can only be appropriated according to the express terms of the Act "for the same purposes."

Towns can appropriate moneys derived from taxation only to the purposes for which they are authorized by law to assess and collect them. The legislature has determined the purposes or uses for which money may be granted, assessed, and collected; and if it can be appropriated to different purposes after it has been collected, then the limitation upon the assessment and collection of it becomes ineffectual and void; because the town has only to express one object in the grant of the money, assess and collect it for that, and then expend it upon objects wholly different. The intention of the limitation was to prevent money from being assessed and collected for other objects than those named in the laws; and this intention cannot be defeated by a misapplication of the money by way of appropriation. The limitations upon the appropriation, and upon the collection, being the same, when the money is derived from taxation, it becomes necessary to examine the statute provisions respecting the grant, assessment, and collection of money. In the sixth section of the Act of the 19th of June, 1821, Rev. Stat. c. 114, the purposes for which money may be granted are thus expressed: "the citizens of any town," "legally qualified to vote," "may grant and vote such sum or sums of money as they shall judge necessary for the settlement, maintenance, and support of the ministry, schools, the poor, and other necessary charges arising within the same town, to be assessed upon the polls and property within the same as by law provided." Towns have also the power to grant and assess money for making and repairing highways; and they have been occasionally authorized to grant money for other purposes, by special enactments; but those purposes have been defined in the Acts giving the power, and no authority can be derived from them to authorize any appropriation of the money referred to in this case. It cannot be contended, that the town of Biddeford, by the vote recited, has applied the money to the support of the ministry, schools, or the poor. Nor is there any good reason for asserting, that it has been applied to any "necessary charges arising within the same town;" because no intimation is afforded by the vote, or by the facts agreed, that the "families" had charges or claims of any kind against

Towns were given authority to distribute this money in the ways they would be justified

the town; and such an extraordinary state of the affairs of any town cannot be presumed.

The case presented by the vote can be regarded only as a donation of the money to the "inhabitants of the town according to families." By a division according to "families" must be understood a division *per capita*, or by numbers; the word "families" being used in such a manner as to indicate clearly, that the term is derived from those parts of the same Act which provide for "ascertaining the population of the several cities, towns, and plantations" by taking the number "of the persons belonging to such family." If towns cannot legally grant, assess, and collect money, and when it has been received, divide it by donation among the families according to numbers; then the money received under the Act of the 8th of March cannot be so divided; because the appropriation of it is restricted by the Act to "the same purposes that they have a right to any money accruing in the treasury from taxation." To contend, that towns have the power to assess and collect money for the purpose of distributing it again according to numbers, is to ask for a construction, not only entirely unauthorized by the language of any statute, but in direct opposition to the language of limitation employed in giving power to the towns to grant money. It not only does this, but it asks the court to give a construction to the statutes, which would authorize towns, if so disposed, to violate "the principles of moral justice." For if the right to assess and collect money is without limit, it would not be difficult to continue the process of collection and division until the whole property held by the citizens of the town, had passed into and out of the treasury; and until an equalization of property had been effected, as nearly as it could be expected to be accomplished, by placing it all in one common fund, and then dividing it by numbers or *per capita*, without distinction of sex or age. Such a construction would be destructive of the security and safety of individual property, and subversive of individual industry and exertion. It would authorize a violation of what is asserted in our "Declaration of Rights" to be one of the natural rights of men, that of "acquiring, possessing, and protecting property." Such a construction would authorize a violation also of that clause in the Constitution of this State which provides that "private property shall not be taken for public uses without just compensation; nor unless the public exigencies require it." No public exigency can require, that one citizen should place his estates in the public treasury for no purpose, but to be distributed to those who have not contributed to accumulate them, and who are not dependent upon the public charity. . . .

The plaintiff, having no legal right to the money claimed, cannot maintain this action; and there must be judgment for the defendants according to the agreement of the parties.¹

¹ By the statute of 1838, c. 311, towns were authorized to distribute the money received under the Act of 1837, c. 265, "*per capita*, among the inhabitants thereof."

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ALLEN ET AL. v. INHABITANTS OF JAY.

SUPREME JUDICIAL COURT OF MAINE. 1872.

[60 Me. 124.¹]

Robert Goodenow, for the petitioners. *S. Belcher*, for the respondents.

APPLETON, C. J. A town meeting of the inhabitants of Jay was duly called to see if the town would loan its credit to Hutchins & Lane, on certain terms, provided "said Hutchins & Lane shall move their new saw-mill and box factory from Livermore Falls to Jay Bridge, and also put in operation one run of stones for grinding meal, and establish their manufacturing business as soon as the month of September, A. D. 1870, at or near Jay Bridge."

At a legal meeting held upon this call on April 19, and by adjournment on April 21, 1870, the town "voted to loan their credit to the amount of ten thousand dollars, at six per cent annually, to H. W. Hutchins and B. R. Lane, provided said Hutchins & Lane will invest the amount of from twelve to thirteen thousand dollars in building a steam saw-mill, box factory machinery and land; also to put in one run of stones for grinding meal, to be located at or near Jay Bridge, and to keep the above-named property in good repair, and also keep it amply insured, and to cause said manufacturing business to be carried on for a term not less than ten years, said Hutchins & Lane to pay all the interest, and ten per cent of the principal annually, after three years," the town to be secured by a mortgage of the mill, machinery, and land, "at the rate of one dollar for every seventy-five cents thus loaned by said town, and the selectmen are hereby authorized to issue town bonds for the above amount, payable in yearly instalments after three years, at six per cent interest annually, viz.: one thousand dollars the first year, and nine hundred dollars each year for the ten succeeding years, providing the whole amount shall be necessary to establish said manufacturing business."

The legislature passed an Act, c. 716, approved Feb. 25, 1871, in the following terms:

"Whereas, upon due investigation and consideration, we deem it for the benefit of the town of Jay, and of the people of this State, said town is hereby authorized to loan the sum of ten thousand dollars to Hutchins & Lane, in accordance with a vote taken by said town on the 21st day of April, eighteen hundred and seventy, for the encouragement of manufacturing in said town."

The complainants, ten taxable inhabitants of Jay, under R. S. c. 77, § 5, by which this court has equity jurisdiction, "when counties, cities, towns, or school districts, for a purpose not authorized by law, vote to

¹ The statement of facts is omitted. — ED.

ed the removal of the saw mill to the town was a private enterprise; the purpose of the taxation would

pledge their credit or to raise money by taxation, or to pay money from their treasury," have filed a bill in equity, praying that the defendants and all their officers may be enjoined from issuing certain bonds, duly described in the bill, the issue thereof being for a purpose not authorized by law.

The purpose is obvious, and the inquiry is, whether the purpose is one authorized by law?

Whether the loan be of town bonds or of money, as, if the loan be of bonds, the town must ultimately be liable for their payment, and as the payment is to be raised by taxation, matters not. The question proposed is whether the legislature can authorize towns to raise money by taxation, for the purpose of loaning the money so raised to such borrowers as may promise to engage in manufacturing or any other business the town may prefer, for their private gain and emolument. Is the raising of money to loan to such persons as the town may determine upon as borrowers, a legal exercise of the power of taxation? Ultimately, it will be found that the question resolves itself into an inquiry, whether the legislature can constitutionally authorize the majority of a town to loan their own and the money of a minority raised by taxation and against the will of such minority, as such majority may determine.

A tax is a sum of money assessed under the authority of the State, on the person or property of an individual for the use of the State. Taxation, by the very meaning of the term, implies the raising of money for public uses, and excludes the raising if for private objects and purposes. "I concede," says Black, C. J., in *Sharpless v. Mayor*, 21 Penn. 167, "that a law authorizing taxation for any other than public purposes, is void." "A tax," remarks Green, C. J., in *Camden v. Allen*, 2 Dutch. 839, "is an impost levied by authority of government, upon its citizens or subjects for the support of the State."

"No authority, or even dictum, can be found," observes Dillon, C. J., in *Hanson v. Vernon*, 27 Iowa, 28, "which asserts that there can be any legitimate taxation when the money to be raised does not go into the public treasury, or is not destined for the use of the government or some of the governmental divisions of the State." . . .

Capital naturally seeks the best investment, or its owners do. Those who by industry and economy have become capitalists are more likely to invest it well than those who, having gained none, have none to lose. The sagacity shown in the acquisition of capital is best fitted to control its use and disposition.

It is obvious, that, if the removal from Livermore Falls would be made without special inducement, in other words, if the prospect of profit at Jay Bridge were sufficient to induce Messrs. Hutchins & Lane to move their saw-mill, etc., without any special offer of the defendant town, there would be no necessity for making such offer. It is not readily perceived that raising money under such circumstances would be of public benefit. If they should not so deem it, and it is not ad-

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vantageous on the whole for them to make the removal, then it is a premium offered for them to make a removal injurious to their interest, and which they would not otherwise make, and of sufficient magnitude to induce them to meet the probable loss. Still less can it be conceived to be of "benefit" in such case to raise money to promote losing enterprises.

It is said that it induces enterprises which would not otherwise be undertaken. But why not undertaken? Every man is the best judge of his interest. There may be exceptions, but such is the general rule. Now why is not capital invested at Jay Bridge? The answer is obvious. No one having capital to invest or loan, is willing, for any existing prospect of gain, to invest or to loan money to be thus invested. The want of existent capital or sufficient probability of profit, is the reason why the proposed undertaking has not been carried into operation.

The idea seems to be that thereby capital would be created. But such is not the case. Capital is the saving of past earnings ready for productive employment. The bonds of a town may enable the holder to obtain money by their transfer as he might do by that of any good note. But no capital is thereby created. It is only a transfer of capital from one kind of business to another.

Nor is capital created by the raising of money by taxation. If the wealth of the country were increased by taxation, the result would be, the higher the taxes the more rapid the increase of its wealth. But the reverse is the case. The wealth of the country is lessened by the time spent in assessing and collecting taxes, and by the taxes collected, if unproductively expended.

Is the removal of the new saw-mill, etc., by Messrs. Hutchins & Lane, a public or private enterprise? Hutchins & Lane are now at Livermore. They propose to remove to Jay Bridge. It is their interest alone which they will consider. But why remove? It is no more a public purpose than any other removal of manufacture from one town to another. The town of Jay is to have no share in the anticipated profits of Messrs. Hutchins & Lane. The State is not to be a partaker of their gains. The new mill, etc., being removed, the town of Jay stands in precisely the same relation to it as other towns to new or old mills within their limits, so far as regards any public benefit to be derived therefrom. The timber of the inhabitants is sawed at the usual compensation. Their grists are ground for the same customary toll as those of others.

The industry of each man and woman engaged in productive employment is of "benefit" to the town in which such industry is employed. This can be predicated of all useful labor — of all productive industry. But because all useful labor, all productive industry, conduces to the public benefit, does it follow that the people are to be taxed for the benefit of one man or of one special kind of manufacturing? If so, then there is no kind of labor, no manufacturing for which the minority of a town may not be assessed for the benefit of an individual. There

Th. doesn't approve the objects for which a loan was made here but he thinks

is nothing of a public nature in the new saw-mill of Hutchins & Lane, any more entitling them to special aid than the owners of any other saw-mill. The sailor, the farmer, the mechanic, the lumberman, are equally entitled to the aid of coerced loans to enable them to carry on their business with Messrs. Hutchins & Lane. Our government is based on equality of right. The State cannot discriminate among occupations, for a discrimination in favor of one is a discrimination adverse to all others. While the State is bound to protect all, it ceases to give that just protection when it affords undue advantages, or gives special and exclusive preferences to particular individuals and particular and special industries at the cost and charge of the rest of the community.

Unless there is something peculiar and transcendental in the new saw-mill to be removed, and in the grist-mill to be erected, and in the labor of Messrs. Hutchins & Lane, it must stand in the same category with other saw-mills and grist-mills, which are and have been, and will be built, and other laborious industries, which are pursued for private gain and emolument.

The alleged justification for raising money to be loaned to private individuals for their own profit, arises from the supposed public benefit to be made of the money so loaned. But the moment the loan is effected, the bonds and money raised from their sale become the bonds and money of the person borrowing, and subject to his control. The town has lost all power over the use and disposition of their loan. True, it may sue for any violation of the contract, if any is made, in reference to the manner of using the bonds or money loaned. The loan, when once made, becomes like all loans. The other borrower has it. It is his. The loan effected, there is the end of the matter.

The question recurs, can the town raise money by taxation merely to loan again to individuals for their own purposes; for it has been seen that the loan effected, the town loaning cannot control the use of the loan, and the loan is merely for the benefit of the individual borrowing. The bonds to be loaned, or the money to be loaned are in the hands of the loaning committee. It is to be loaned for a longer or shorter time, upon security good, bad, indifferent; fortunate, if only the latter. Is the loaning of bonds or money by the town in any respect different from the loaning of money by individuals? Does the mere fact that the town makes the loan irrespective of any other consideration make the loan a public "benefit" more than, or different from, any other loan by an individual or banking corporation having funds to loan? . . . [Here the case of *Hooper v. Emery*, 14 Me. 379, is stated.]

But whether the money raised is to be distributed *per capita* or loaned, can make no difference in principle. If towns can assess and collect money to be again loaned to such persons as the majority may select for such purposes as it may favor, with such security or without security, as it may elect, property ceases to be protected in its acquisition or enjoyment. Whether the estates of citizens are to be placed in the public treasury for the purpose of dividing them, or of loaning

them to those who have not accumulated them, matters not. In either case, the owner is despoiled of his estate, and his savings are confiscated.

If the loan be made to one or more for a particular object, it is favoritism. It is a discrimination in favor of the particular individual and a particular industry, thereby aided, and is one adverse to and against all individuals, all industries, not thus aided.

If it is to be loaned to all, then it is practically a division of property under the name of a loan. It is communism incipient, if not perfected.

If it were proposed to pass an Act enabling the inhabitants of the several towns by vote to loan horses or oxen, or to lease houses to any individual for his private gain, whom the majority may select, the monstrous absurdity of such legislation would be transparent. But the mode by which property would be taken from one or more and loaned to others can make no difference. It is the taking to loan, or otherwise disposing of property for private purposes, against the consent of the owner, that constitutes the wrong, no matter how taken. Whether the horse be taken from the reluctant owner to be loaned to some favored livery-stable keeper, or the loan be of money raised by the collector on its sale or by the payment of the tax to avoid such sale, does not change the result. In either case the horse or the value thereof is loaned by others, without the owner's consent. If a part of one's estate may be taken from him and loaned to others, another and another portion may be taken and loaned until all is gone. }

By the Constitution of this State, "certain natural inherent and unalienable rights" are guaranteed to the citizens of this State, "among which are those of . . . acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness." What motive is there for the acquisition of property, if the tenure of the acquisition is the will of others? How can our property be protected, if the legislature can enable a majority to transfer by gift or loan, to certain favored and selected individuals through the medium of direct taxation, such portions of one's estate as they may deem expedient? Men only earn when they are protected in the acquisition, possession, and enjoyment of their property. The barbarous nations of Asia have neither industry nor capital, the result of saving, for the reason that property is without protection. Where is the protection of property if one's money or his goods can be wrested from him and loaned to others? Where is the difference between the coerced contribution of the tax-gatherer to be loaned to individuals for their benefit, and those of the conqueror from the inhabitants of the conquered territory? If one's money may be taken from him without and against his consent, to be loaned to an individual whom he would not trust, for a time which might be inconvenient, for a purpose which he might deem injudicious, what protection is afforded him? What would be thought of a statute requiring individuals to give their notes to others to be discounted for their special benefit, or to raise money to be thus loaned? What differs

*Don't not
rather save*

it whether individuals are compulsorily required to loan their notes on time to others, to be discounted for such others, or the bonds of the town are issued to be loaned, which the citizens may ultimately be compelled to pay? All security of private rights, all protection of private property is at an end, when one is compelled to raise money to loan at the will of others, or to pay his contributory share of loans of money or bonds made to others for their own use and benefit, when the power is given to a majority to lend or give away the property of an unwilling minority.

Further, by the Constitution, "private property shall not be taken for public uses without just compensation, and unless public exigencies require it."

The right of eminent domain is an attribute of sovereignty. It is the right to seize and appropriate specific articles of property for public use when some public exigency requires it, and not otherwise. . . .

But even if the moving of a new saw mill from one town to another adjacent, or the building of a new grist-mill, the moving being for the benefit of the owners of the mill, and the building of the grist-mill for the benefit of the builders, or the giving or loaning money to produce such results for such purpose, were by some strange perversion of language from its ordinary acceptation to be deemed a public use, though the public have no more right to use it than they have any other property of individuals; and if by strength of imagination a public exigency could be perceived in making such change of location and such new erection, or in giving or loaning for such purposes, and a just compensation could be found when there is or may be none whatever, and it were to be deemed a just protection of property that a majority might loan the property of a minority, or encumber it with debts for private objects against the will and protestations of such minority, still the complainants are entitled to have the injunction heretofore granted made perpetual. The legislature have not said that the removal of the new saw-mill of Messrs. Hutchins & Lane, or their building a grist-mill with one run of stones is for the "public use," or is required by any public exigency, but many things may be for the "benefit" of Jay, and not for public use. Many things may be for the "benefit" of the people of the State, which are not required by any existing "public exigency." All the legislature seem to have determined is that Jay affords a better site for the saw-mill and grist-mill of Messrs. Hutchins & Lane than the one occupied by them in the town of Livermore.

The Constitution of the State is its paramount and binding law. The acquisition, possession, and protection of property are among the chief ends of government. To take directly or indirectly the property of individuals to loan to others for purposes of private gain and speculation against the consent of those whose money is thus loaned, would be to withdraw it from the protection of the Constitution and submit it to the will of an irresponsible majority. It would be the robbery and spoliation of those whose estates, in whole or in part, are thus confis-

ated. No surer or more effectual method could be devised to deter from accumulation—to diminish capital, to render property insecure, and thus to paralyze industry. *Injunction made perpetual.*

WALTON, BARROWS, and DANFORTH, JJ., concurred. DICKERSON, J., concurred in the result upon the principles stated in his opinion in 58 Maine, 600-606.¹

BREWER BRICK COMPANY v. INHABITANTS OF BREWER.

SUPREME JUDICIAL COURT OF MAINE. 1873.

[62 Me. 62.²]

Wilson and Woodward, for the plaintiffs. A. W. Paine, for the defendants.

APPLETON, C. J. This is an action of *assumpsit* to recover three hundred and nine dollars and seventy-five cents paid by the plaintiffs for taxes. The proceedings on the part of the defendants are admitted to have been correct, and the only question presented is whether the property of the plaintiff, upon which the tax in question was assessed, is liable to assessment.

The business of brick-making has been carried on in the defendant town for more than fifty years until the present time, by the old process of making bricks with horse-power.

The plaintiff corporation was organized under the general law of the State, on the fourth day of June, 1870, for the purpose of manufacturing brick in the defendant town, and after its organization, proceeded at once to erect the necessary buildings and machinery for the manufacture of brick by new processes, in which business it has been engaged to the present time.

At the annual town meeting of the defendant town held March 14, 1870, the following vote was passed, *viz.*: "Voted, that the town will exempt from taxation, for a term of ten years, manufacturing and refining establishments hereafter erected in town, and the capital used for operating the same, together with such machinery hereafter put into buildings already erected, but not now used as such, and the capital used for operating the same, provided that the capital invested shall not be less than \$10,000, and provided, further, that this vote shall not be construed to apply to manufacturing or business now carried on in the town, and no distillery of intoxicating drinks or malt beer shall be entitled to the benefit of this vote."

The estate of the plaintiffs was duly assessed for its just and proportional share upon the whole valuation of the property of the town

¹ And so other advisory opinions of the Maine justices in 58 Me. 590 (1871). See note to the principal case, by Judge Redfield, in 12 Am. Law Reg. n. s. 493. — Ed.

² The statement of facts is omitted. — Ed.

claimed exemption from contributions toward public
causes under & by virtue of this vote. Their property
being assessed they bring assumpsit to

others. To exempt p[er]s[ons] would be to make him a gift to them and this gift would in reality

liable to assessment. The plaintiffs claim exemption from contributing toward the public expenses, under and by virtue of this vote of the town.

By an Act approved March 8, 1864, c. 234, § 1, it is enacted, that "all manufacturing establishments, and all establishments for refining, purifying, or in any way enhancing the value of any article or articles already manufactured, hereafter erected by individuals or by incorporated companies, and all the machinery and capital used for operating the same, together with all such machinery hereafter put into buildings already erected, but not now occupied, and all the capital used for operating the same, are exempted from taxation for a term not exceeding ten years, after the passage of this Act, where the amount of capital actually invested shall exceed the sum of two thousand dollars; provided, towns and cities in which such manufacturing establishments or refineries may be located, or in which it may be proposed to establish the same, shall in a legal manner give their assent to such exemption, and such assent shall have the force of a contract, and be binding for the full time specified; and provided further, that all property so exempted, shall be entered from year to year on the assessment books, and returned with the valuations of the several towns and cities, when required by the State for the purposes of making the State valuation." By an Act approved Feb. 8, 1867, c. 76, § 1, the exemption referred to in the Act of 1864, c. 234, § 1, takes effect from the date of the contract authorized by that Act. By an Act approved March 12, 1869, c. 65, § 1, the exemption referred to takes effect "from the date of the assent given by the town to such exemption." The preceding legislation on this subject is found condensed in R. S., 1871, c. 6, § 6, ninth clause.

Taxation exacts money from individuals as and for their contributory share of the public burdens. A tax is generally understood to mean the imposition of a duty or impost for the support of government. *Pray v. Northern Lib.*, 31 Penn. 69. "Taxes are burdens or charges imposed by the legislature upon persons or property," says Dillon, C. J., in *Hanson v. Vernon*, 27 Iowa, 28, "to raise money for public purposes or to accomplish some governmental end." Private property may be taken under the power of eminent domain for public purposes, if just compensation therefor be made. But for private purposes it cannot be wrested from its owner, even with compensation.

It has been settled by a series of decisions that the legislature cannot constitutionally authorize towns to raise money by taxation to give or loan to individuals or corporations for private purposes. A good public house may be very desirable, but in *Weeks v. Milwaukee*, 10 Wis. 242, the Supreme Court of Wisconsin justly treated with little consideration the claim of a right to favor, under the power of taxation, the construction of a public hotel, though the aid was to be rendered expressly "in view of the great public benefit which the construction of the hotel would be to the city." It was there decided that

the statute. But the court seize the opportunity to declare the law unconstitutional. But the court is wrong in this.

the public could not be compelled to aid such an enterprise from any regard to the incidental benefits to be derived therefrom. It may be very desirable to have a saw-mill in a town, and those who wish it have full liberty to erect it; but the inhabitants cannot legally be taxed to raise money to give or to loan to those, who propose, for their own benefit, to erect one, or to take down one already erected, and to remove it from one town to another. *Allen v. Jay*, 60 Maine, 124. A terrible conflagration sweeps over a city destroying its wealth by millions. Its rebuilding is absolutely necessary for its commercial wants. But each lot of land is private property; each building to be erected thereon will be private property. Its erection is for private use. After full consideration, it was decided that the inhabitants of the city could not be taxed to raise money to loan to the sufferers to enable them to rebuild. *Lowell v. Boston*, 110 Mass. In the *Commercial Bank v. the City of Iola*, 2 Dillon, 353, it was held that the legislature of a State had no authority to authorize taxation in aid of private enterprises and objects; and that municipal bonds issued under legislative authority to be paid by taxation, as a *bonus* or donation to secure the location or aid in the erection of a manufactory or foundry, owned by private individuals, are void even in the hands of owners for value.

Contingent and incidental benefits may arise from the introduction of manufacturing capital whenever the enterprise is successful. But the reverse may equally ensue, and the enterprise become an injurious failure. The inhabitants of a town cannot legally be taxed to raise money to give or to loan to individuals or corporations for private purposes on account of any supposed incidental advantages which may possibly accrue therefrom. The benefits are precisely those arising from the introduction of capital or labor, and none other. It matters not whether it be the building of the huge factory of the capitalist or the cottage of the laborer, the benefits are the same in kind and differ only in degree. There are benefits arising from the introduction of capital well invested and of labor well employed; but they are of the same nature as those arising from the existent capital of the place in which the incoming capital is to be invested, and the incoming labor employed. One is just as much entitled to protection as the other, and no more. But this benefit, whatever it may be, if any, arises from all capital and all labor; and as all labor and all capital is equally entitled to equal protection according to its extent, it follows that equal protection to all leaves the matter as it found it. Hence, it is universally held that the incidental benefits of capital afford no justification for partial taxation.

It is conceded in the argument that towns and cities cannot constitutionally be authorized to raise by taxation money to be given away. The plaintiff's share of the expenses of the defendant town for all public purposes is conceded to be \$309.75. If the town were empowered to raise that sum to give the plaintiffs, it is admitted that the Act so

empowering them would be unconstitutional, for if the town may raise money to give to A, they may do the same for B, and so on; and the property of the minority would be subject to the will of the majority. But the remission of a tax by a vote of the town is in substance and effect the same as a gift. What matters it to the plaintiffs or the defendants whether the town votes to give \$309.75 to the plaintiffs, or to exempt their property from its just and proportional tax, and assess the amount of such exemption upon the remaining estate liable to taxation? It is a gift. The money raised by the rest of the tax-payers is raised to give away; and if it may be done for these plaintiffs, it may be done for any other inhabitant as well.

But there are other and grave objections to the constitutionality of the statute upon which the plaintiffs rely.

By the Constitution, article 9, § 7: "while the public expenses shall be assessed on polls and estates, a general valuation shall be taken at least once in ten years." The expenses for which assessments are to be made shall be public; those appertaining to the public service. No authority is given, either expressly or by implication, to assess for merely private purposes; as to give away, or to loan to individuals.

By article 9, § 8: "all taxes upon real estate, assessed by authority of this State, shall be apportioned and assessed equally, according to the just value thereof." Though this section applies specially to real estate, yet the very idea of taxation implies an equal apportionment and assessment upon all property, real and personal, "according to its just value." It cannot for a moment be admitted that the Constitution authorizes an unequal apportionment and assessment upon real and personal estate, without any reference to its "just value."

The power to impose taxes is broad and liberal:—for roads, that there may be facilities for travel; for schools, that the people may be educated; for libraries, that their means of improvement may be increased; for the poor, lest they may suffer from want; for the police of the State, for the safety of the public, that crime may be detected; for the courts of law, that individual rights may be protected and enforced, and that crime, when proved, may receive its fitting punishment;—in fine, for any and all purposes which, in the most liberal sense, can be deemed public. "Taxation having for its only legitimate object the raising of money for public purposes and the proper needs of government, the exaction of moneys from the citizens for other purposes is not a proper exercise of this power, and must therefore be unauthorized." Cooley's Const. Lim. 487.

The legislature may determine the amount of taxation and select the objects. They may exempt by general and uniform laws certain descriptions of property from taxation, and lay the burden of supporting government elsewhere. But while there are no limits in the amount of taxation for public purposes, nor in the subject-matter upon which it may be imposed, the requirement that it shall be uniform and equal upon the valuations made is universal.

The general Tax Act is based upon the whole valuation of the State. The taxes are apportioned among the several towns in the ratio of their respective valuations. The manufacturing capital to be exempted by this statute is included in the valuation of the town in which the investment is made. Whether there shall be an exemption or not depends upon the vote of the town. Now it is for the legislature to impose taxes and to exempt from taxation. But exemption from taxation includes the imposition of taxes. To the precise extent that one man's estate is exempted from taxation, to that same extent is there an imposition of the amount exempted upon the rest of the inhabitants. The \$309.75 of which the plaintiffs would escape the payment would be imposed upon the residue of the inhabitants of Brewer. This imposition of, and this exemption from, taxation are by the town and not by the legislature.

To have uniformity of taxation, the imposition of, and the exemption from taxation, must be by one and the same authority—that of the legislature. It is for the legislature to determine upon what subject-matter taxation shall be imposed; upon land, upon loans, upon stock, &c., &c.; but the subject-matter once fixed, the rule is general, and applies to all property within its provisions. So it may relieve certain species of property from taxation, as the tools of the laborer, the churches of religious societies, &c.; but upon the non-exempted estate the taxation must be uniform, as the exemptions are uniform. It cannot be pretended that it would be constitutional to impose a tax on a church in A, and to exempt one of the same character in B; to say that all or a part of the farms in the former shall be subject to a tax, while those in the latter shall be free from taxation. But if it be conceded that each town has the right to tax part and exempt part of the property located therein, whatever its character, uniformity in relation to the subject-matter, as well as to the ratio of taxation, is at an end.

If, of the innumerable varieties of manufacture, different towns exempt different, or the same species of manufacture, the utter want of uniformity is obvious. The cotton manufacturer in one town is exempt, while in the next the woollen manufacturer pays his proportional share of the public burden. Nor is this all:—if the same kind of manufacture has been heretofore carried on as is proposed to be exempted from the payment of taxes, then in the same town in case of exemption, will be seen the remarkable spectacle of two manufacturers, engaged in the same industrial pursuits, the one with his capital freed from all public burdens, the other bearing his just and proportional share. The larger the investment of exempted capital, the heavier the burden upon the non-exempted capital. Of two competing capitalists, in the same branch of industry, one goes into the market with goods relieved from taxes, while the goods of the other bear the burden. One manufacturer is taxed for his own estate and for that which is exempted, to relieve his competing neighbor, and to enable the latter to undersell him in the common market, — and that

is precisely the relation these plaintiffs bear to their competing brick-makers, — a grosser inequality is hardly conceivable!

Nor is there any conceivable benefit to any one from this injustice. The town voting the exemption will be one in which the proposed manufactures thereby to be exempted could, or could not, be advantageously carried on. If the former, the very principle of self-interest will induce such manufacturer to establish himself in the town so voting, without the inducement of such vote. It would, then, be the unnecessary giving of money to one whose interests would be promoted by manufacturing in the place in question. It would be compelling the rest of the inhabitants to add to the gains of a capitalist without participation therein. If otherwise, and the town so voting is an injudicious place for the location of the manufactures to be exempted, it is an invitation to the manufacturer to engage in a losing business with a proffer to bear the loss to the extent of the exemption. The exemption is either unnecessary or unwise.

The plaintiffs have only paid their proportional share of the taxes in the defendant town according to its valuation. The plaintiffs are not entitled to recover. To permit them to do so would be to approve unconstitutional taxation for private purposes and to sanction a system which would destroy all uniformity as to the property upon which taxes are to be imposed, and all equality as to the ratio, so far as regards the valuation. It can never be admitted that the Constitution of this State permits or allows the taxation of a portion of its citizens for the private benefit of a chosen few, and that the taxes raised for such a purpose shall be assessed without reference to uniformity of taxable property, or equality of ratio. It becomes, therefore, entirely unnecessary to consider whether or not the plaintiffs are within the provisions of the statute or the terms of the vote under which they claim exemption from taxation.

Plaintiffs nonsuit.

WALTON, DICKERSON, BARROWS, DANFORTH, and VIRGIN, JJ., concurred.

CUTTING, J., concurred in the result.

PETERS, J., having been of counsel for plaintiffs, did not sit in this case, but he concurred in a similar opinion and result in *Andrews v. Oxford*, involving precisely the same question.¹

¹ Notwithstanding this decision, the people of some of the towns of Maine continue the practice here condemned as unconstitutional. The following is a duly attested extract from the records of the town of Enfield, Maine, fifteen years after the foregoing decision, viz., May 10, 1888: "Voted, That the town exempt from taxation, for the term of ten years, all of the plant to be erected of the Piscataquis Falls Pulp and Paper Company, also if it is necessary for said manufacturing company to have a boarding-house for their employees, and a house for the superintendent, that said boarding-houses be also exempt from taxation for ten years. But all dwelling-houses built by company or others for private or public use to pay taxes in proportion with other taxable property in town."

The validity of such exemptions seems to be recognized in New Hampshire. *Franklin Needle Co. v. Franklin*, 65 N. H. 177 (1889). — Ed.

LOWELL ET AL. v. CITY OF BOSTON.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1873.

[111 Mass. 454.]

BILL in equity by John A. Lowell and nine others, taxable inhabitants of the city of Boston, praying that the defendants might be restrained from issuing bonds under the St. of 1872, c. 364,¹ on the ground that the statute was unconstitutional. The defendants demurred for want of equity, and the case was heard and reserved by GRAY, J., upon bill and demurrer, for the consideration of the full court.

B. R. Curtis and *J. G. Abbott*, for the defendants. *D. Foster*, for the petitioners.

WELLS, J. This is a proceeding under the provisions of the Gen. Sts. c. 18, § 79, to restrain the city of Boston from issuing its bonds for the purpose of raising a fund to be appropriated to the object of rendering aid, by way of loans, in rebuilding upon that portion of the city which was burned over in November, 1872. The issue of bonds for that purpose, to an amount not exceeding \$20,000,000, was expressly authorized by the St. of 1872, c. 364. The question, therefore, is distinctly presented whether the authority thus conferred upon the city is contrary to the provisions of the Constitution of the Commonwealth.

The issue of bonds by the city, whatever provision may be made for their redemption, involves the possible and not improbable consequence of a necessity to provide for their payment by the city. The right to incur the obligation implies the right to raise money by taxation for payment of the bonds; or, what is equivalent, the right to levy a tax for the purposes for which the fund is to be raised by means of the bonds so authorized.

It is a question, not of municipal authority, but of legislative power. The point of difficulty is not as to the distribution of the burden by allowing it to be imposed upon a limited district within the State; but as to the right of the legislature to impose or authorize any tax for the object contemplated by this statute.

The power to levy taxes is founded on the right, duty, and responsibility to maintain and administer all the governmental functions of the State, and to provide for the public welfare. To justify any exercise of

¹ The statute purported to authorize the city to issue bonds to an amount not exceeding \$20,000,000, and provided for the appointment of three commissioners, with authority to apply the proceeds of these bonds in loans to the owners of land burned over in the great fire of Nov. 9 and 10, 1872, upon notes or bonds secured by first mortgages of this land, conditioned upon rebuilding within one year from Jan. 1, 1873. The commissioners were to apply the loans, and to make other conditions and provisions as they should think best calculated to insure the employment of the money in rebuilding on the land and repaying the loans. And they were authorized to withhold payment of any loan agreed on when they should think it necessary "to insure the speedy rebuilding on said land." — Ed.

unconstitutional was brought and an injunction as granted. The promotion of the interests of individ-

advancement of the public welfare is a private and not a public object.

the power requires that the expenditure which it is intended to meet shall be for some public service, or some object which concerns the public welfare. The promotion of the interests of individuals, either in respect of property or business, although it may result incidentally in the advancement of the public welfare, is, in its essential character, a private and not a public object. However certain and great the resulting good to the general public, it does not, by reason of its comparative importance, cease to be incidental. The incidental advantage to the public, or to the State, which results from the promotion of private interests, and the prosperity of private enterprises or business, does not justify their aid by the use of public money raised by taxation, or for which taxation may become necessary. It is the essential character of the direct object of the expenditure which must determine its validity, as justifying a tax, and not the magnitude of the interests to be affected, nor the degree to which the general advantage of the community, and thus the public welfare, may be ultimately benefited by their promotion.

The principle of this distinction is fundamental. It underlies all government that is based upon reason rather than upon force. It is expressed in various forms in the Constitution of Massachusetts. In Art. XI. of c. 2, § 1, by restricting the issuing of moneys from the treasury to purposes of "the necessary defence and support of the Commonwealth; and for the protection and preservation of the inhabitants thereof, agreeably to the Acts and Resolves of the General Court." In Art. IV. of c. 1, § 1, by declaring the purposes for which the power of taxation, in its various forms, may be exercised by the General Court to be "for the public service, in the necessary defence and support of the government of the said Commonwealth, and the protection and preservation of the subjects thereof." The purport and scope of these provisions are made more distinct, and the essential idea upon which they rest is disclosed by reference to the preceding Declaration of Rights, by which the theory and purpose of this frame of government were set forth by its founders. Art. X. declares, "Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty, and property, according to standing laws. He is obliged, consequently, to contribute his share to the expense of this protection; to give his personal service, or an equivalent, when necessary: but no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent or that of the representative body of the people. In fine, the people of this Commonwealth are not controllable by any other laws than those to which their constitutional representative body have given their consent. And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor."

The power of the government, thus constituted, to affect the individual in his private rights of property, whether by exacting contribu-

case proceeds on any peculiarity of the Const. The provision of the Const of Mass is gently broad.

This is not a public purpose. Restrictions of public purpose.

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tions to the general means, or by sequestration of specific property, is confined, by obvious implication as well as by express terms, to purposes and objects alone which the government was established to promote, to wit, public uses and the public service. This power, when exercised in one form, is taxation; in the other, is designated as the right of eminent domain. The two are diverse in respect of the occasion and mode of exercise; but identical in their source, to wit, the necessities of organized society; and in the end by which alone the exercise of either can be justified, to wit, some public service or use. It is due to their identity in these respects that the two powers, otherwise so unlike, are associated together in the same article. So far as it concerns the question what constitutes public use or service that will justify the exercise of these sovereign powers over private rights of property, which is the main question now to be solved, this identity renders it unnecessary to distinguish between the two forms of exercise, as the same tests must apply to and control in each. An appropriation of money raised by taxation, or of property taken by right of eminent domain, by way of gift to an individual for his own private uses exclusively, would clearly be an excess of legislative power. The distinction between this and its appropriation for the construction of a highway is marked and obvious. It is independent of all considerations of resulting advantage. The individual, by reason of his capacity, enterprise, or situation, might be enabled to employ the money or property thus conferred upon him in such a manner as to furnish employment to great numbers of the community, to give a needed impulse to business of various kinds, and thus promote the general prosperity and welfare. In this view, it might be shown to be for the public good to take from the unenterprising and thriftless their unemployed capital and intrust it to others who will use it to better advantage for the interests of the community. But it needs no argument to show that such an arbitrary exercise of power would be a violation of the constitutional rights of those from whom the money or property was taken, and an unjustifiable usurpation.

In the case of a highway, on the other hand, its direct purpose of public use determines conclusively the question in support of the exercise, both of the right of eminent domain and of taxation, however trifling the advantage to the public compared with that to individuals. The extent or value of the public use, and the wisdom and propriety of the appropriation, are matters to be determined exclusively by the legislature, either directly or by its delegated authority. When the power exists, it is not within the province of the court to interfere with its exercise, by any inquiry into its expediency.

The two instances above referred to illustrate the sense in which the furthering of the public good by promotion of the interests of many individuals differs from a public service. A public service may or may not be productive, practically, of public advantage. Resulting advantage to the public does not of itself give to the means by which it is produced the character of a public service.

but later cases have not been able to adhere
it consistently.

There are, indeed, many cases in which the sovereign power of government is exercised to affect private rights of property in favor of private parties, either individuals or corporations. Most conspicuous among these are turnpikes and railroads, in whose favor this right of eminent domain is frequently exercised. Private rights are thus taken and transferred, not to the State, but to the private corporation; and the compensation to the persons injured, required by the Constitution, is also rendered from the corporation. Such an appropriation of property is justified, and can only be justified, by the public service thereby secured in the increased facilities for transportation of freight and passengers, of which the whole community may rightfully avail itself. The franchises of the corporation are held charged with this duty and trust for the performance of the public service, for which they were granted. *Commonwealth v. Wilkinson*, 16 Pick. 175; *Same v. Boston & Maine Railroad*, 3 Cush. 25, 45; *Old Colony & Fall River Railroad Co. v. County of Plymouth*, 14 Gray, 155, 161.

This right of eminent domain is often allowed to be exercised in favor of private aqueduct companies. Here, too, the public service, intended as the object of the grant of the right, is obvious. And although the interests of the aqueduct company are ordinarily relied upon to secure the proper performance of the service, yet, in case of any failure or abuse, the obligation may doubtless be otherwise enforced. *Lumbard v. Stearns*, 4 Cush. 60.

The Mill Acts, so called, are often referred to as authorizing the exercise of the right of eminent domain by private parties for their exclusive private benefit. And the language of the court, used *arguendo*, has been sometimes such as to imply that the growth and prosperity of manufacturing and other industrial enterprises were of such importance to the public welfare as to justify the exercise of the right of eminent domain in their behalf, as a public use. *Boston & Roxbury Mill Co. v. Newman*, 12 Pick. 467; *Hazen v. Essex Co.*, 12 Cush. 475, 478; *Talbot v. Hudson*, 16 Gray, 417, 426.

That mills for the sawing of lumber for purposes of building, grinding grain for food, and the manufacture of material for clothing, may be of such necessity to a community, especially in the early settlement of a country, as to make their establishment a provision for a public service, we do not question. It is doubtless within the power of the legislature to declare the existence of a public exigency for the establishment of a mill, for which the right of eminent domain may properly be exercised; as in the case of the Boston & Roxbury Mill Corporation, and the Salem Mill-dam Corporation. What may be the limits of legislative power in that direction, and whether there are any limits except in the sound discretion of the legislature, it is needless now to inquire. We are satisfied that the Mill Acts are not founded upon that power, and do not authorize its exercise.

The advantages to be derived from a running stream by the several riparian proprietors are of natural right. Each one may make use of its

waters, as they flow through his lands, in a reasonable manner, for such purposes as they are adapted to serve. In order that each may have his opportunity in turn, each is entitled to have the water allowed to flow to and from his land as it has been accustomed to flow, with only such modifications as result from such reasonable use. Hence, all proprietors upon a stream, from its source to its mouth, have, in a certain sense, a common interest in it, and a common right to the enjoyment of all its capacities. Among those capacities no one is more important than that of the force of the current to supply power for the operation of mills. To make that force practically serviceable requires a considerable head and fall at the point where it is to be applied; often more than can be gained within the limits of one proprietor. The use of the stream in this mode has always been regarded as a reasonable use, notwithstanding the effect of the dam, by which the head is created, to retard the water in its flow to the proprietor below, and to set it back and thus diminish or destroy the force of the current above. One who thus appropriates the force of the current is in the enjoyment of a common right, in which he is protected, although he may thereby prevent a like use subsequently by the proprietor above. *Hutch v. Dwight*, 17 Mass. 289, 296; *Cary v. Daniels*, 8 Met. 466; *Gould v. Boston Duck Co.*, 13 Gray, 442. But this protection extends no farther than to justify the appropriation of a part of that quality of the stream which, until so appropriated, is common to all. It does not justify any, even the least, injury to land outside the channel. Without some law to control, the mill owner would be exposed, not merely to the liability to make just compensation for injuries thus occasioned, but to harassing suits for damages and to abatement of his dam as causing a nuisance. This liability and the inevitable controversies growing out of conflicting rights in the stream itself, tending to defeat all advantageous use of its power, led to the adoption of laws regulating and protecting the beneficial use of streams for mill purposes. The St. of 1795, c. 74, is introduced by the recital, "Whereas the erection and support of mills, to accommodate the inhabitants of the several parts of the State, ought not to be discouraged by many doubts and disputes, and some special provisions are found necessary relative to flowing adjacent lands and mills held by several proprietors." But there is no public service secured through the Mill Acts, except so far as it may result incidentally, and as the inducements of private interest may lead mill-owners to devote their mills to purposes favorable to the public accommodation. The same rights and protection are secured to all who may be possessed of sites for mills, whatever the purpose for which their mills may be designed, and however useless for all purposes of public accommodation or advantage. There is no discrimination in this respect, and no provision to secure any public service that may be supposed to have been contemplated. Further than this, each proprietor is allowed to avail himself of the rights secured by the Mill Acts, in his own mode and for his own purposes, at his own discretion, without the interven-

tion of any public officer or other tribunal or board, to whom such a governmental function as the exercise of the right of eminent domain is ordinarily intrusted, when not under the special direction of the legislature itself.

A consideration, still more conclusive to this point, is, that in fact no private property, or right in the nature of property, is taken by force of the Mill Acts, either for public or private use. They authorize the maintenance of a dam to raise a head of water, although its effect will be to overflow the land of another proprietor. This right of flowage is sometimes inaccurately called an easement. *Hunt v. Whitney*, 4 Met. 603; *Talbot v. Hudson*, 16 Gray, 417, 422, 426. But it is not so. It confers no right in the land upon the mill-owner, and takes none from the land-owner. *Murdock v. Stickney*, 8 Cush. 113; *Storm v. Manchaug Co.*, 13 Allen, 10. In *Murdock v. Stickney*, Chief Justice Shaw remarks in reference to the Mill Acts, "The principle on which this law is founded is not, as has sometimes been supposed, the right of eminent domain, the sovereign right of taking private property for public use. It is not in any proper sense a taking of the property of an owner of the land flowed, nor is any compensation awarded by the public." In *Bates v. Weymouth Iron Co.*, 8 Cush. 548, 553, he says, "It is a provision by law, for regulating the rights of proprietors, on one and the same stream, from its rise to its outlet, in a manner best calculated, on the whole, to promote and secure their common rights in it." Similar declarations are made in *Fiske v. Framingham Manuf. Co.*, 12 Pick. 68; *Williams v. Nelson*, 23 Pick. 141.

This regulation of the rights of riparian proprietors, both in respect to the stream and to their adjacent lands, liable to be affected by its use, involves no other governmental power than that "to make, ordain, and establish all manner of wholesome and reasonable orders, laws, statutes, and ordinances," as the General Court "shall judge to be for the good and welfare of this Commonwealth, and for the government and ordering thereof, and of the subjects of the same." Const. of Mass. c. 1, § 1, Art. IV.

All individual rights of property are held subject to this power, which alone can adjust their manifold relations and conflicting tendencies. The absolute right of the individual must yield to and be modified by corresponding rights in other individuals in the community. The resulting general good of all, or the public welfare, is the foundation upon which the power rests, and in behalf of which it is exercised; whether by restricting the use of private property in a manner prejudicial to the public (*Commonwealth v. Alger*, 7 Cush. 53); or by imposing burdens upon it for the protection or convenience in part of the public (*Goddard, Petitioner*, 16 Pick. 504); *Baker v. Boston*, 12 Pick. 184, 193 (*Salem v. Eastern Railroad Co.*, 98 Mass. 431); or by modifying rights of individuals, in respect of their mutual relations, in order to secure their more advantageous enjoyment by each.

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joint tenants and tenants in common of houses and mills may require necessary repairs to be made, with indemnity out of the joint rents or income for the cost thereof. *Calvert v. Aldrich*, 99 Mass. 74. Upon the same principle one joint tenant is allowed to sever the joint tenancy by conveyance or partition, and thus change the nature of the estate of his co-tenant, as well as his own. *Shaw v. Hearsey*, 5 Mass. 521. Gen. Sts. c. 136, § 1.

Estates in common may be divided at the suit of any one of the co-tenants; and if not conveniently or advantageously divisible equally, one may be required to accept less than his full share, with an equivalent in money for the deficiency. *Hagar v. Wiswall*, 10 Pick. 152; *Buck v. Wolcott*, 13 Gray, 268. And by a recent statute, under certain conditions, the whole may be sold, and the proceeds in money divided instead of the land. St. 1871, c. 111.

Upon the same principle, proprietors of wharves, or of general fields, affected by a common interest or a common necessity, are allowed to adopt measures to secure their common advantage, although burdens or restrictions result therefrom which must be shared by the minority, as well as the majority, by whose determination the measures were adopted. Gen. Sts. c. 67. *Wright v. Boston*, 9 Cush. 233.

No other power was exercised for the construction of drains and sewers until 1841, when cities and towns were authorized to exercise for that object the power of taxation. St. 1841, c. 115. The property in such drains and sewers was by the same Act vested in the city or town; so that there was a public use as well as a public service, for which that power was delegated. The exercise of the right of eminent domain, for the same object, was delegated to the city of Boston by the St. of 1857, c. 225, § 1, and to all other cities and towns by the St. of 1869, c. 111.

In the statutes for the improvement of meadows, the provisions for the assessment and collection of the expenses, in form, resemble taxation, and the power exercised over private property is sometimes ascribed to the right of eminent domain. *Talbot v. Hudson*, 16 Gray, 417, 428. But there is no taking for public use. It is a proceeding of a semi-judicial nature, in which all those whose lands are to be affected are joined as parties. The action taken therein relates to that in which all have a common interest, or in reference to which all are affected by a common necessity. That common necessity is met, and that common interest secured, by subjecting the individual rights to such modifications as the commissioners may judge to be most practicable to secure the best advantage of all. The natural conflict of rights which would arise if each were left to insist on his own, regardless of consequences to others, is avoided by the intervention of this common agent, by whom they are adjusted with due regard to the interests of all as well as of each. For this purpose they are treated as owners of a common property. *Coomes v. Burt*, 22 Pick. 422.

The commissioners have no power to affect any lands of persons not

joined as parties in the proceedings, or to assess upon them any part of the expenses. *Sherman v. Tobey*, 3 Allen, 7; *Day v. Hulburt*, 11 Met. 321. They are, indeed, authorized to open flood-gates of any mill, or make needful passages through or round any dam, or erect a temporary dam on land of any person, though not a party, and maintain the same as long as necessary "for the purpose of obtaining a view of the premises, or of the more convenient or expeditious removal of obstructions." This is not sequestration, but simply a temporary subjection of the privileges of the mill-owner to the necessities which pertain to the exercise of the general power of regulation over the common rights in the entire stream. It accords with the general principle that the particular right of the individual must yield to the greater right, in the same degree, of the whole.

We find in these statutes no exercise of the right of eminent domain, or of the governmental power of taxation. That which, in form, resembles taxation, is, in effect, only an equitable apportionment, among the parties to the proceedings, of the expenses incurred for their common benefit, by their common agents, or rather by the officers of the tribunal charged by the legislature with the conduct of those proceedings which it authorizes for the execution of its wholesome and reasonable orders and laws in that behalf made and provided. It differs from assessments for drains (*Hildreth v. Lowell*, 11 Gray, 345), sidewalks (*Lowell v. Hadley*, 8 Met. 180), and street "betterments" (*Jones v. Aldermen of Boston*, 104 Mass. 461), not only in the manner in which all persons to be assessed are required to be made parties to the whole proceedings, but also and especially in the absence of any public use or service as the leading and direct object of the expenditure for which it is made.

"The good and welfare of this Commonwealth," for which "reasonable orders, laws, statutes, and ordinances" may be made, by force of which private rights of property may be affected, is a much broader and less specific ground of exercise of power than "public use" and "public service." The former expresses the ultimate purpose, or result sought to be attained by all forms of exercise of legislative power over property. The latter imply a direct relation between the primary object of an appropriation and the public enjoyment. The circumstances may be such that the use or service intended to be secured will practically affect only a small portion of the inhabitants or lands of the Commonwealth. The essential point is, that it affects them as a community, and not merely as individuals. *Cooley*, Const. Limit. 531. This distinction is indicated, and recognized as vital, in *Talbot v. Hudson*, 16 Gray, 417, 423, 425, and it lies at the foundation of the decision in that case. There was a taking of private property, by direct authority of the legislature, which the court held to have been intended as an exercise of the constitutional power to take private property for public use, rendering compensation. The main question was, whether the relief of an extensive territory of valuable lands, in a thickly settled agricultural region, from the nuisance of flooding by the waters of a

stream, caused by a single dam below, constituted such an object of public concern as to justify the exercise of the power by removing the dam. The court recognized the difficulty that, so far as the removal of the dam benefited each land-owner, it was a private use which would not justify the exercise of that power. But the obstruction in the stream injuriously affected "so large a territory, situated in different towns, and owned by a great number of persons," as to give it the character of a public nuisance, the removal of which "would seem to come fairly within the scope of legislative action." While we do not assent to the suggestions in that opinion, that the general provisions of law for the regulation of mills and the improvement of meadows are based upon the constitutional power to appropriate private property under the right of eminent domain, we accord fully with the judgment rendered and the general principle upon which it is founded.

The same principle is developed in *Dorgan v. Boston*, 12 Allen, 223, and *Dingley v. Boston*, 100 Mass. 544. The public use, in one case, was in the improvement of the public streets; in the other, in the remedy for a great public nuisance requiring extraordinary measures for its removal. In both there was a great improvement in the character and value of the new buildings erected upon the territory affected, and thus a promotion of the general prosperity and public welfare. This benefit to the community was anticipated, and was doubtless one of the influential inducements to the adoption of the statutes giving authority for the improvements. It was not in this general advantage, however, that the justification, under the Constitution, for such an exercise of power was found, but in the direct and special public service.

In *Hazen v. Essex Co.*, 12 Cush. 475, before referred to, there was a distinct and clear public service declared as the object of the Act conferring the power to destroy private property, to wit, the improvement of the navigation of Merrimack River. The case does not rest upon the general benefit from the establishment of mills.

Without such public use or service expressly declared, or implied from the nature of the object of the expenditure, taxation in any form cannot be justified. *Lowell v. Oliver*, 8 Allen, 247; *Freeland v. Hastings*, 10 Allen, 570; *Dorgan v. Boston*, 12 Allen, 223, 240; *Merrick v. Amherst*, Ib. 500.

In *Morse v. Stocker*, 1 Allen, 150, it was held that an assessment for the expense of a sidewalk in a street which was so by dedication only, and in which no right of way was secured to the party assessed, or to the public by its acceptance or location by the proper authorities, was unconstitutional and void.

There is no public use or public service declared in the statute now under consideration, and we are of opinion that none can be found in the purposes of its provisions. By its terms the proceeds of the bonds, thereby authorized, are to be expended in loans to persons who are or may become owners of land in Boston, "the buildings upon which were burned by the fire in said Boston on the ninth and tenth days of

November," 1872. The ultimate end and object of the expenditure, as indicated by the provisions of the statute itself, is "to insure the speedy rebuilding on said land."

The general result may indeed be thus stated collectively, as a single object of attainment; but the fund raised is intended to be appropriated distributively, by separate loans to numerous individuals, each one of which will be independent of any relation to the others, or to any general purpose, except that of aiding individual enterprise in matters of private business. The property thus created will remain exclusively private property, to be devoted to private uses at the discretion of the owners of the land; with no restriction as to the character of the buildings to be erected, or the uses to which they shall be devoted; and with no obligation to render any service or duty to the Commonwealth, or to the city, — except to repay the loan, — or to the community at large or any part of it. If it be assumed that the private interests of the owners will lead them to re-establish warehouses, shops, manufactories, and stores, and that the trade and business of the place will be enlarged or revived by means of the facilities thus provided, still these are considerations of private interest, and, if expressly declared to be the aim and purpose of the Act, they would not constitute a public object, in a legal sense.

As a judicial question the case is not changed by the magnitude of the calamity which has created the emergency; nor by the greatness of the emergency, or the extent and importance of the interests to be promoted. These are considerations affecting only the propriety and expediency of the expenditure as a legislative question. If the expenditure is, in its nature, such as will justify taxation under any state of circumstances, it belongs to the legislature exclusively to determine whether it shall be authorized in the particular case; and however slight the emergency, or limited or unimportant the interests to be promoted thereby, the court has no authority to revise the legislative action.

On the other hand, if its nature is such as not to justify taxation in any and all cases in which the legislature might see fit to give authority therefor, no stress of circumstances affecting the expediency, importance, or general desirableness of the measure, and no concurrence of legislative and municipal action, or preponderance of popular favor in any particular case, will supply the element necessary to bring it within the scope of legislative power.

The expenditure authorized by this statute being for private and not for public objects, in a legal sense, it exceeds the constitutional power of the legislature; and the city cannot lawfully issue the bonds for the purposes of the Act.

This discussion has, for obvious reasons, taken a somewhat wider range than was required for the decision of the case immediately before us. We have purposely confined it to the consideration of judicial decisions and utterances in Massachusetts; because the question is of legislative power under the Constitution of this Commonwealth. The

recent decision of the Supreme Judicial Court of Maine, however, in the case of *Allen v. Jay*, 60 Maine, 124, to which we are referred, is of especial significance and importance from the similarity in the organic law of the two States, and the almost exact identity of the question presented by the facts. It fully sustains the conclusions to which we have been led in this case.

*Demurrer overruled. Injunction ordered.*¹

¹ But see *Gillan v. Gillan*, 55 Pa. 430 (1867). Compare *1 Hare, Am. Const. Law*, 283.

In *Kingman et al. Petrs.* 153 Mass. 566, 577 (1891), the court (CHARLES ALLEN, J.) said: "The constitutionality of the St. of 1889, c. 439, is attacked by the different respondents on several grounds. The first objection is, that the object in view, which is to provide for the disposal of sewage from a number of cities and towns, is not of such a character that the legislature can properly appropriate money in furtherance of it from the treasury of the Commonwealth. . . . Assuming that the respondents may so far represent the general public as to be entitled to raise this question, it is plain that the objection can hardly be considered as of great weight, since the decision in *Talbot v. Hudson*, 16 Gray, 417. It was there held, on the greatest consideration, that the legislature might provide for the removal of a dam, by means of which a large tract of land situated in different towns, and owned by a large number of persons, was overflowed, and might provide for compensation out of the treasury of the Commonwealth to persons whose property was thereby injured; the court saying, at page 425, 'It has never been deemed essential that the entire community or any considerable portion of it should directly enjoy or participate in an improvement or enterprise in order to constitute a public use, within the true meaning of these words as used in the Constitution.' The improvement which the statute of 1889 is designed to effect stands far stronger, as an object of general public utility, than that which was the subject of consideration in *Talbot v. Hudson*. It has for its purpose to promote the public health, to avert disease, and to prevent nuisances. The territory to be benefited according to the Report of the State Board of Health, to which we are referred, includes an area of one hundred and thirty square miles, and contains one sixth of the population of the State. The legislature has declared that a system of sewerage to accommodate this territory and this portion of the people of the State is an object of public utility, such as warrants the expenditure or the advancement for the time being of money from the treasury of the Commonwealth. It is impossible for us to say to the contrary. The argument is made to us, that, if such an expenditure of public money is warranted, the legislature might authorize an appropriation for the benefit of a single town, and construct and maintain forever a local improvement for such town. But in determining the power of the legislature in a case like this, little assistance is obtained by imagining extreme instances of possible abuse of the power. *Norwich v. County Commissioners*, 13 Pick. 60, 62. Nor need we undertake to define how far the legislature might properly go, in a special emergency, in giving direct assistance to a particular town. Those curious in prosecuting such an inquiry may find examples of what has been done in the past in the St. of 1874, c. 325, providing for the payment of one hundred thousand dollars towards the expenses of rebuilding roads and bridges in the town of Williamsburg, which had been destroyed by a flood; and, in earlier times, in the grants to Boston of £600 in 1752 for the relief of the poor, on account of the small-pox, and of £1,100 in 1760, on account of losses by fire. Prov. St. 1751-52, c. 19, 3 Prov. Laws (State ed.), 606. Prov. St. 1760-61, c. 35, 4 Prov. Laws (State ed.), 440. See also *Moore v. Sanford*, 151 Mass. 285; *Lowell v. Oliver*, 8 Allen, 247, 255. It is enough for us to say that no valid objection lies to the St. of 1889 on this ground."

The last Province statute referred to in the foregoing opinion (4 Prov. Laws, State ed 440), is found in one of the editor's notes, and is as follows: "Chap. 11. 'June

LOAN ASSOCIATION v. TOPEKA.

SUPREME COURT OF THE UNITED STATES. 1874.

[20 Wall. 655.]

ERROR to the Circuit Court for the District of Kansas.

The Citizens' Savings and Loan Association of Cleveland brought their action in the court below, against the city of Topeka, on coupons for interest attached to bonds of the city of Topeka.

The bonds on their face purported to be payable to the King Wrought-Iron Bridge Manufacturing and Iron-Works Company, of Topeka, to aid and encourage that company in establishing and operating bridge shops in said city of Topeka, under and in pursuance of section twenty-six of an Act of the Legislature of the State of Kansas, entitled "An Act to incorporate Cities of the Second Class," approved February 29, 1872; and also of another "Act to authorize Cities and Counties to issue Bonds for the purpose of building Bridges, aiding Railroads, Water-power, or other Works of Internal Improvement," approved March 2, 1872.

The city issued one hundred of these bonds for \$1,000 each, as a donation (and so it was stated in the declaration), to encourage that company in its design of establishing a manufactory of iron bridges in that city.

The declaration also alleged that the interest coupons first due were paid out of a fund raised by taxation for that purpose, and that after this payment the plaintiff became the purchaser of the bonds and the coupons on which suit was brought for value.

A demurrer was interposed by the city of Topeka to this declaration.

The section of the Act of February 29, on which the main reliance was placed for the authority to issue these bonds, reads as follows:

"SECTION 76. The council shall have power to encourage the establishment of manufactories and such other enterprises as may tend to develop and improve such city, either by direct appropriation from the general fund or by the issuance of bonds of such city in such amounts as the council may determine; *Provided*, That no greater amount than one thousand dollars shall be granted for any one purpose, unless a majority of the votes cast at an election called for that purpose shall

19, 1760. In the House of Representatives — In answer to the prayer of the petition of the selectmen of the town of Boston, Voted that the sum of eleven hundred pounds be granted and paid out of the public treasury of this Province to the town of Boston, in lieu of any abatement on their proportion of the Province tax, on account of their losses by the fire on the twentieth of March last; the same to be applied to the abatement of the taxes of the particular persons who have sustained losses by said fire, in such proportion as the assessors of said town shall determine. In Council, read and concurred. Consented to by the Lieutenant-Governor.' — *Council Records*, vol. xxiii., page 463."

The value of the material preserved by the learned editor of these volumes of the Massachusetts Province Laws is not as widely known as it should be. — ED.

authorize the same. The bonds thus issued shall be made payable at any time within twenty years, and bear interest not exceeding ten per cent per annum."

It was conceded that the steps required by this Act prerequisite as to issuing the bonds were regular, as were also the other details, and that the language of the statute was sufficient to justify the action of the city authorities, if the statute was within the constitutional competency of the legislature.

The single question, therefore, for consideration raised by the demurrer was the authority of the Legislature of the State of Kansas to enact this part of the statute.

The court below denied the authority, placing the denial on two grounds:—

1st. That this part of the statute violated the fifth section of Article XII. of the Constitution of the State of Kansas; a section in these words:—

"SECTION 5. Provision shall be made by general law for the organization of cities, towns, and villages; and their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, shall be so restricted as to prevent the abuse of such power."

[The argument here was that the section of the Act of February 29, 1872, conferring the power to issue bonds, contained no restriction as to the amount which the city might issue to aid manufacturing enterprises, and that the failure of the legislature to limit and restrict the power so as to prevent abuse, violated the fifth section of Article XII. of the Constitution above referred to.]

2d. That the Act authorized the towns and other municipalities to which it applied, by issuing bonds or lending its credit, to take the property of the citizen under the guise of taxation to pay these bonds, and use it in aid of the enterprises of others which were not of a public character; that this was a perversion of the right of taxation, which could only be exercised for a public use, to the aid of individual interests and personal purposes of profit and gain.

The court below accordingly, sustaining the demurrer, gave judgment in favor of the defendant, the city of Topeka; and to its judgment this writ of error was taken.

Mr. Alfred Ennis, for the plaintiff in error. *Messrs. Ross, Burns, and A. L. Williams, contra.*

MR. JUSTICE MILLER delivered the opinion of the court.

Two grounds are taken in the opinion of the circuit judge and in the argument of counsel for defendant, on which it is insisted that the section of the statute of February 29, 1872, on which the main reliance is placed to issue the bonds, is unconstitutional.

The first of these is, that by section five of article twelve of the Constitution of that State it is declared that provision shall be made by general law for the organization of cities, towns, and villages: and their power of taxation, assessment, borrowing money, contracting debts,

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and loaning their credit, shall be so restricted as to prevent the abuse of such power.

The argument is that the statute in question is void because it authorizes cities and towns to contract debts, and does not contain any restriction on the power so conferred. But whether the statute which confers power to contract debts should always contain some limitation or restriction, or whether a general restriction applicable to all cases should be passed, and whether in the absence of both the grant of power to contract is wholly void, are questions whose solution we prefer to remit to the State courts, as in this case we find ample reason to sustain the demurrer on the second ground on which it is argued by counsel and sustained by the Circuit Court.

That proposition is that the Act authorizes the towns and other municipalities to which it applies, by issuing bonds or loaning their credit, to take the property of the citizen under the guise of taxation to pay these bonds, and use it in aid of the enterprises of others which are not of a public character, thus perverting the right of taxation, which can only be exercised for a public use, to the aid of individual interests and personal purposes of profit and gain.

The proposition as thus broadly stated is not new, nor is the question which it raises difficult of solution.

If these municipal corporations, which are in fact subdivisions of the State, and which for many reasons are vested with quasi legislative powers, have a fund or other property out of which they can pay the debts which they contract, without resort to taxation, it may be within the power of the legislature of the State to authorize them to use it in aid of projects strictly private or personal; but which would in a secondary manner contribute to the public good; or where there is property or money vested in a corporation of the kind for a particular use, as public worship or charity, the legislature may pass laws authorizing them to make contracts in reference to this property, and incur debts payable from that source.

But such instances are few and exceptional, and the proposition is a very broad one, that debts contracted by municipal corporations must be paid, if paid at all, out of taxes which they may lawfully levy, and that all contracts creating debts to be paid in future, not limited to payment from some other source, imply an obligation to pay by taxation. It follows that in this class of cases the right to contract must be limited by the right to tax, and if in the given case no tax can lawfully be levied to pay the debt, the contract itself is void for want of authority to make it.

If this were not so, these corporations could make valid promises, which they have no means of fulfilling, and on which even the legislature that created them can confer no such power. The validity of a contract which can only be fulfilled by a resort to taxation depends on the power to levy the tax for that purpose. *Sharpless v. Mayor of Philadelphia*, 21 Pennsylvania State, 147, 167; *Hanson v. Vernon*,

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27 Iowa, 28; *Allen v. Inhabitants of Jay*, 60 Maine, 127; *Lowell v. Boston*, Massachusetts (MS.); *Whiting v. Pon du Lac*, 25 Wisconsin, 188. It is, therefore, to be inferred that when the legislature of the State authorizes a county or city to contract a debt by bond, it intends to authorize it to levy such taxes as are necessary to pay the debt, unless there is in the Act itself, or in some general statute, a limitation upon the power of taxation which repels such an inference.

With these remarks and with the reference to the authorities which support them, we assume that unless the Legislature of Kansas had the right to authorize the counties and towns in that State to levy taxes to be used in aid of manufacturing enterprises, conducted by individuals, or private corporations, for purposes of gain, the law is void, and the bonds issued under it are also void. We proceed to the inquiry whether such a power exists in the Legislature of the State of Kansas. . . .

We have referred to this history of the contest over aid to railroads by taxation, to show that the strongest advocates for the validity of these laws never placed it on the ground of the unlimited power in the State legislature to tax the people, but conceded that where the purpose for which the tax was to be issued could no longer be justly claimed to have this public character, but was purely in aid of private or personal objects, the law authorizing it was beyond the legislative power, and was an unauthorized invasion of private right. *Olcott v. Supervisors*, 16 Wallace, 689; *People v. Salem*, 20 Michigan, 452; *Jenkins v. Andover*, 103 Massachusetts, 94; Dillon on Municipal Corporations, § 587; 2 Redfield's Laws of Railways, 398, rule 2.

It must be conceded that there are such rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism. It may well be doubted if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than by many. The theory of our governments, State and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers.

There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute which enacted that A and B, who were husband and wife to each other, should be so no longer, but that A should thereafter be the husband of C, and B the

wife of D. Or which should enact that the homestead now owned by A should no longer be his, but should henceforth be the property of B. *Whiting v. Fon du Lac*, 25 Wisconsin, 188; Cooley on Constitutional Limitations, 129, 175, 487; Dillon on Municipal Corporations, § 587.¹ {Of all the powers conferred upon government that of taxation is most liable to abuse.} Given a purpose or object for which taxation may be lawfully used, and the extent of its exercise is in its very nature unlimited. It is true that express limitation on the amount of tax to be levied or the things to be taxed may be imposed by constitution or statute, but in most instances for which taxes are levied, as the support of government, the prosecution of war, the national defence, any limitation is unsafe. The entire resources of the people should in some instances be at the disposal of the government.

The power to tax is, therefore, the strongest, the most pervading of all the powers of government, reaching directly or indirectly to all classes of the people. It was said by Chief Justice Marshall, in the case of *McCulloch v. The State of Maryland*, 4 Wheaton, 431, that the power to tax is the power to destroy. A striking instance of the truth of the proposition is seen in the fact that the existing tax of ten per cent, imposed by the United States on the circulation of all other banks than the national banks, drove out of existence every State bank of circulation within a year or two after its passage. This power can as readily be employed against one class of individuals and in favor of another, so as to ruin the one class and give unlimited wealth and prosperity to the other, if there is no implied limitation of the uses for which the power may be exercised.

To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms.

Nor is it taxation. A "tax," says Webster's Dictionary, "is a rate or sum of money assessed on the person or property of a citizen by government for the use of the nation or State." "Taxes are burdens or charges imposed by the legislature upon persons or property to raise money for public purposes." Cooley on Constitutional Limitations, 479. Coulter, J., in *Northern Liberties v. St. John's Church*, 13 Pennsylvania State, 104; see also *Pray v. Northern Liberties*, 31 Id. 69; *Matter of Mayor of New York*, 11 Johnson, 77; *Camden v. Allen*, 2

¹ "To determine, then, the extent of the law-making power, we have only to look to the provisions of the Constitution. It has, and can have, no other limit than such as is there prescribed; and the doctrine that there exists in the judiciary some vague, loose, and undefined power to annul a law, because in its judgment it is 'contrary to natural equity and justice,' is in conflict with the first principles of government, and can never, I think, be maintained. I am aware that some eminent judges, when the question was not before them, have expressed a belief in the existence of such a power; but no court has ever, I believe, assumed to declare an explicit enactment of the legislature void on that ground." — SELDEN, J., in *Wynehamer v. The People*, 13 N. Y. 430. — ED.

Dutcher, 398; *Sharpless v. Mayor of Philadelphia*, *supra*; *Hanson v. Vernon*, 27 Iowa, 47; *Whiting v. Fon du Lac*, 25 Wisconsin, 188, says, very forcibly, "I think the common mind has everywhere taken in the understanding that taxes are a public imposition, levied by authority of the government for the purpose of carrying on the government in all its machinery and operations — that they are imposed for a public purpose."

We have established, we think, beyond cavil that there can be no lawful tax which is not laid for a public purpose. It may not be easy to draw the line in all cases so as to decide what is a public purpose in this sense and what is not.

It is undoubtedly the duty of the legislature which imposes or authorizes municipalities to impose a tax to see that it is not to be used for purposes of private interest instead of a public use, and the courts can only be justified in interposing when a violation of this principle is clear and the reason for interference cogent. And in deciding whether, in the given case, the object for which the taxes are assessed falls upon the one side or the other of this line, they must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether State or municipal. Whatever lawfully pertains to this, and is sanctioned by time and the acquiescence of the people, may well be held to belong to the public use, and proper for the maintenance of good government, though this may not be the only criterion of rightful taxation.

But in the case before us, in which the towns are authorized to contribute aid by way of taxation to any class of manufacturers, there is no difficulty in holding that this is not such a public purpose as we have been considering. If it be said that a benefit results to the local public of a town by establishing manufactures, the same may be said of any other business or pursuit which employs capital or labor. The merchant, the mechanic, the innkeeper, the banker, the builder, the steamboat owner are equally promoters of the public good, and equally deserving the aid of the citizens by forced contributions. No line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two-thirds of the business men of the city or town.

A reference to one or two cases adjudicated by courts of the highest character will be sufficient, if any authority were needed, to sustain us in this proposition. . . . [Here follows a statement of *Allen v. Jay*, 60 Me. 124; *Lowell v. Boston*, 111 Mass. 454; *Curtis v. Whipple*, 24 Wisc. 350; and *Whiting v. Fon du Lac*, 25 Wisc. 188.]

These cases are clearly in point, and they assert a principle which meets our cordial approval. . . . *Judgment affirmed.*¹

¹ The same point was passed upon in *Cole v. La Grange*, 113 U. S. (1884). GRAY, J., for the court, said: "In *Loan Association v. Topeka*, 20 Wall. 655, bonds of a city,

CLIFFORD, J., gave a dissenting opinion, in the course of which he said: "Courts cannot nullify an Act of the State Legislature on the vague ground that they think it opposed to a general latent spirit supposed to pervade or underlie the Constitution, where neither the terms nor the implications of the instrument disclose any such restriction. *Walker v. Cincinnati*, 21 Ohio State, 41. Such a power is denied to the courts, because to concede it would be to make the courts sovereign over both the Constitution and the people, and convert the government into a judicial despotism. *Golden v. Prince*, 3 Washington's Circuit Court, 313. Subject to the Federal Constitution the legislature of the State possesses the whole legislative power of the people, except so far as the power is limited by the State Constitution. *Bank v. Brown*, 26 New York, 467; *People v. Draper*, 15 Id. 532. . . . Unwise laws and such as are highly inexpedient and unjust are frequently passed by legislative bodies, but there is no power vested in a Circuit Court nor in this Court, to determine that any law passed by a State legislature is void if it is not repugnant to their own Constitution nor the Constitution of the United States.

issued, as appeared on their face, pursuant to an Act of the Legislature of Kansas, to a manufacturing corporation, to aid it in establishing shops in the city for the manufacture of iron bridges, were held by this court to be void, even in the hands of a purchaser in good faith and for value. A like decision was made in *Parkersburg v. Brown*, 106 U. S. 487. The decisions in the courts of the States are to the same effect. *Allen v. Jay*, 60 Maine, 124; *Lowell v. Boston*, 111 Mass. 454; *Weismer v. Douglas*, 64 N. Y. 91; *In re Eureka Co.*, 96 N. Y. 42; *Bissell v. Kankakee*, 64 Illinois, 249; *English v. People*, 96 Illinois, 566; *Central Branch Union Pacific Railroad v. Smith*, 23 Kansas, 745. We have been referred to no opposing decision. . . . It is averred in the answer, and admitted by the demurrer, that the La Grange Iron and Steel Company, to which the bonds were issued, was 'a private manufacturing company, formed and established for the purpose of carrying on and operating a rolling-mill,' and 'was a strictly private enterprise, formed and prosecuted for the purpose of private gain, and which had nothing whatever of a public character.' The ordinance referred to shows that the mill was to manufacture railroad iron; but that is no more a public use than the manufacture of iron bridges, as in the Topeka case, or the making of blocks of stone or wood for paving streets. There can be no doubt, therefore, that the Act of the Legislature of Missouri is unconstitutional, and that the bonds, expressed to be issued in pursuance of that Act, are void upon their face."

In *Burlington v. Beasley*, 94 U. S. 310 (1876), in error to the United States Circuit Court for Kansas, the question was as to the validity of certain bonds issued under a statute to aid an individual "in the construction and completion, and to furnish the motive-power of a steam custom grist-mill." In sustaining a judgment in favor of the holder of the bonds, HUNT, J., for the court, said: "The statute of Kansas upon the subject of grist-mills is based upon the idea, and, indeed, upon the declaration, that all grist-mills are public institutions. In c. 65 of the statute of 1868, p. 573, it is thus enacted: 'All water, steam, or other mills, whose owners or occupiers grind or offer to grind grain for toll or pay, are hereby declared public mills.' Regulation is then made for the order in which customers shall be attended to (first come first served), the liability of the miller, his duty in assisting to load or unload, and that the rates of toll shall be conspicuously posted.

"Under our recent decision in *Munn v. Illinois*, 94 U. S. p. 112, and the other cases upon kindred subjects, it would be competent to the Legislature of Kansas to regulate

regulating it. Probably not a public purpose.

7 Sup. Ct. Reb. 30 - A private elevator was built on the tracks right in front of the P. & O. Co. car barn.

NORTH DAKOTA v. NELSON COUNTY.

SUPREME COURT OF NORTH DAKOTA. 1890.

[1 No. Dak. 88.]

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THIS is a proceeding brought in the Supreme Court by application made for leave to file an information in order to procure an injunction restraining defendant from issuing seed-grain bonds. No briefs were filed.

George F. Goodwin, Attorney-General, and Burke Corbett, for the motion. M. N. Johnson, State's Attorney, and F. R. Fulton, opposed.

WALLIN, J. . . . The objects and purposes contemplated by the statute may be readily gathered from the above extracts, and they are clear and unmistakable in their character. The legislature, by this enactment, so far as it can do so, has clothed the several counties of the State where there has been a preceding crop failure with authority to lend their aid in procuring seed-grain to such of their citizens as are engaged in farming pursuits, who make it appear, in manner and form as detailed by the law, that they are unable to procure such seed-grain by any other means. The law empowers the counties to lend their aid out of money to be obtained by the issue and sale of county bonds, such bonds to be paid, principal and interest, from funds obtained by means of a general tax levy upon all of the taxable property situated within the counties that issue such bonds. Two features of this statute stand out in conspicuous prominence. First. All benefits obtainable under the Act are confined to persons engaged in the pursuit of farming, and among farmers only those who propose to continue the business of farming after the aid in contemplation has been received by them. Second. No part of the fund is intended to be used in support or aiding such indigent persons as have already become a county charge, viz., paupers.

The objections which may be made to the validity of this statute are twofold: First, it may be claimed that the tax authorized by the statute is not for a public purpose, hence not a valid tax; second, it may be contended that, under § 185 of the State Constitution, counties are expressly forbidden to make donations, or lend their aid to either corporations or individuals, hence that the proposed aid is unconstitutional, as repugnant to said section. The courts of this country, and of all countries where constitutional liberty exists, agree with the elementary

the toll to be taken at these mills. It is a reasonable construction of this statute to hold that aid to this mill is aid of a public work within its meaning, and that the construction and equipment of a steam grist-mill was an internal improvement. The case of *Loan Association v. Topeka*, 20 Wall. 661, will adjudge these bonds to be legal. The point is there expressly made that bonds, when issued for a public purpose, a public use, which it is the right and the duty of the State government to assist, are valid. The issue we are considering falls within this definition." — Ed.

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writers upon the science of government that it is essential to the validity of a tax that it be laid for a public purpose. Difficulty has frequently arisen in discriminating between public and private objects; but where the object is primarily to foster private enterprises, and the only benefit to be derived by the public is incidental and secondary, the tax will be annulled by the courts as an abuse of the legislative prerogative. In the first instance the duty devolves upon the legislative branch of the government to determine whether a proposed tax is or is not for a public purpose; and courts are loath to interpose and declare any tax unlawful, and will only do so in case of a palpable disregard of the wise limitations, express and implied, restricting the power of taxation. But where the legislature assumes, in the guise of taxation, to compel A to advance his private means to aid B in the prosecution of a purely private enterprise, the courts will not hesitate to perform the duty of declaring such tax void, as subversive of fundamental and vested individual rights, and will do so even in cases where there is no express constitutional inhibition. The power of confiscation does not exist in the legislature. The cases cited below are but a few of the numberless cases which have applied these principles to statutes imposing pretended taxes. *Association v. Topeka*, 20 Wall. 655; *Bank v. City of Iola*, 2 Dill. 353; *City of Parkersburgh v. Brown*, 106 U. S. 487, 1 Sup. Ct. Rep. 442; *Cole v. City of La-Grange*, 113 U. S. 1, 5 Sup. Ct. Rep. 416; *Allen v. Jay*, 60 Me. 124; *Lowell v. Boston*, 111 Mass. 453; *State v. Osawakee Tp.*, 14 Kan. 422; *Coates v. Campbell* (Minn.), 35 N. W. Rep. 366; *Cooley*, Const. Lim. (marg.) p. 487; *Cooley*, Tax'n (2d ed.), pp. 55, 126.

Under these authorities, the test to be applied to the seed-grain statute is this: Is the tax provided for in the statute laid for a public purpose? If this question is answered in the negative, the statute must be declared null and void, without reference to § 185 of the State Constitution, to which the attention of the court has been particularly directed. The statute makes provision for levying a general tax, in counties issuing the bonds, for the benefit of a numerous body of citizens, who, without fault of theirs, and solely by reason of successive crop failures, are now reduced to extremities, and are in fact impoverished to such an extent that they are, for the present time, wholly without the ability to obtain the grain necessary for seeding the lands from which they derive the necessities of life. It is agreed on all sides that this class of citizens, having already exhausted their private credit, must have friendly aid from some source in procuring seed-grain, if they put in crops this year. The legislature, by this statute, has devised a measure which seems well adapted to meet the exigency, and promises to give the needed relief, with little prospect of ultimate loss to the county treasuries. It is reasonable to anticipate that the beneficiaries of the Act will be enabled to tide over their present embarrassments, and, through the aid granted them by this statute, a wide-spread calamity, both public and private, will be averted. The crisis in the

development of the State which renders some measure of wholesale relief imperatively necessary is fully recognized by all well-informed citizens of the State, and this court will be justified in taking judicial notice of the existing status. The stubborn fact exists that a class of citizens, numbered by many thousands, is in such present straits from poverty, that unless succored by some comprehensive measure of relief they will become a public burden, in other words, paupers, dependent upon counties where they reside for support. It is to avert such a widespread disaster that the seed-grain statute was enacted, and it should be interpreted in the light of the public danger which was the occasion of its passage. "The support of paupers, and the giving of assistance to those who, by reason of age, infirmity, or disability are likely to become such, is, by the practice and the common consent of civilized countries, a public purpose." Cooley, *Tax'n* (2d ed.), pp. 124, 125. "The relief of the poor — the care of those who are unable to care for themselves — is among the unquestioned objects of public duty." Opinion of Brewer, J., in *State v. Osawkee Tp.*, 14 Kan. 424. If the destitute farmers of the frontier of North Dakota were now actually in the almshouses of the various counties in which they reside, all the adjudications of the courts, State and Federal, upon this subject could be marshalled as precedents in support of any taxation, however onerous, which might become necessary for their support. But is it not competent for the legislature, representing the tax-payers, in the exercise of its discretion, and within the limits of county indebtedness prescribed by the State Constitution to clothe county commissioners with authority to be exercised at their discretion, to make small loans, secured by prospective crops, to those whose condition is so impoverished and desperate as to reasonably justify the fear that, unless they receive help, they and their families will become a charge upon the counties in which they live?

We have carefully examined the authorities above cited, and many others of similar import, and while fully assenting to the principles enunciated by the cases, *viz.*, that all taxation must be for a public purpose, we do not, with the single exception of the Kansas case, regard them as parallel cases, and applicable to the question presented in the case at bar. As we view the matter, the tax in question is for a public purpose, *i. e.*, a tax for the "necessary support of the poor." The case of *State v. Osawkee Tp.*, *supra*, asserts a doctrine which would defeat the tax in question. This court has great respect for the court which promulgated that decision, and the most sincere admiration for the distinguished jurist now upon the Supreme bench of the nation, who wrote the opinion in that case. Nevertheless, we cannot yield our assent to the reasoning of the case, leading to the conclusion that a loan of aid to an impoverished class, not yet in the poorhouse, is necessarily a tax for a private purpose. In our view, it is not certain, or even probable, in the light of subsequent experience in the West, that the court of last resort in the State of Kansas would enunciate

the doctrine of that case at the present day. The decision was made fifteen years ago. While the fundamental principles which underlie legislation and taxation have not changed in the interval, it is also true that the development of the Western States has been attended with difficulties and adverse conditions which have made it necessary to broaden the application of fundamental principles to meet the new necessities of those States. Under the stress of adversity peculiar to the condition of the frontier farmer, there has come to be an expansion of the legal meaning of the term "poor" sufficient to embrace a class of destitute citizens who have not yet become a public charge. The main features of the seed-grain statute are neither new nor novel. It was borrowed from territorial legislation, and long prior to that, the State of Minnesota, in aid of agricultural settlers upon its western frontier, enacted a series of statutes which are open to every criticism which can be made upon the statute under consideration. Chapter 43 Laws Dak. 1889. See also pp. 1024-1030, Gen. St. Minn. 1878.

The Legislature of Minnesota has frequently, and by a variety of laws, extended aid to the frontier farmers of that State, who, far from being paupers, were yet reduced to extremities, by reason of continued crop failures resulting from hailstorms, successive seasons of drought, and from the ravages of grasshoppers. Under one law, towns are authorized to vote a tax to defray the expense of destroying grasshoppers; under another statute, the governor, State auditor, and State treasurer were authorized to borrow \$100,000 on State bonds, to be issued by them, and the proceeds were to be expended in the purchase of seed-grain for the needy farmers. Again, and at the same session, the same State officials were empowered to issue additional bonds to the same amount, to pay a debt contracted for a similar purpose, upon warrants of the State auditor. § 6 of the Minnesota Act of 1878, c. 93, provides as follows: "The credit of the State is hereby pledged to the payment of the interest and principal of the bonds mentioned in this Act, as the same may become due." By another section the State auditor is authorized and required to levy an annual tax necessary to meet the interest and principal of the debt created by these bonds. Many of the features of the two seed-grain statutes passed at the first session of the legislature of this State are borrowed from Minnesota. In principle, the legislation of the two States is identical. The aid extended is furnished in the form of a loan to individual farmers, secured on their crops, but to be met primarily by taxation. The destitute communities of farmers who were thus assisted in a neighboring State were enabled thereby to tide over their temporary necessities, and are now self-supporting.

This review of legislation in aid of destitute farmers will serve to illustrate the well-known fact that legislation under the pressure of a public sentiment, born of stern necessity, will adapt itself to new exigencies, even if in doing so a sanction is given to a broader application of elementary principles of government than have before been recog-

nized and applied by the court in adjudicated cases. It is the boast of the common law that it is elastic, and can be adjusted to the development of new social and business conditions. Can a statute enacted for such broadly humane and charitable purposes be annulled by another branch of the government as an abuse of legislative discretion? We think otherwise. Great deference is due from the courts to the legislative branch of the State government, and it is axiomatic that in cases of doubt the courts will never interfere to annul a statute. Cooley, Const. Lim. (marg.) p. 487.

It will be presumed that the legislature, in passing the seed-grain statute, acted upon the fullest knowledge of the necessities of the situation, and also presumed that they have passed the statute after due deliberation and with the clearest apprehension of the scope and purpose of the language used in § 185 of the State Constitution. That section is not only restrictive upon counties, but it is also permissive. It permits counties to lend aid for "the necessary support of the poor." To our mind, the restrictive words of that section were intended to prevent the loan of aid either to individuals or corporations, for the purpose of fostering business enterprises, either of a public or private nature; but that the people who adopted the Constitution, as well as those who framed the instrument, expressly intended by the language of that section to grant a power affirmatively to the municipal corporations named in § 185, to lend their aid and make donations for the "necessary support of the poor." The attention of the court has been directed to the constitutions of nineteen of the States, in which the language of § 185 is used *verbatim*, except only that in the States of North and South Dakota the words above quoted are interpolated. Why was this peculiar language introduced into the constitutions of North and South Dakota, when nothing of the kind was found in that of the other seventeen States? Why did not the conventions which formed the organic law for North and South Dakota simply copy the language which, with this exception, is borrowed from the other constitutions, without inserting the excepting clause under consideration? To our mind, the answer to these questions is found in the peculiar and alarming condition of the people of Dakota Territory in the year 1889, when the two Dakotas assumed the responsibilities of statehood. Such conditions had not before existed, and hence the constitutions of other States had made no provisions to meet such necessities. When the two States formed and adopted their constitutions the fact was well known and recognized by the people of Dakota that the condition of many farming communities was such that some comprehensive measure for their relief was an imperative necessity. In such a conjuncture the words were interpolated into § 185 of the Constitution, which permit counties to loan their aid for the "necessary support of the poor." No constitutional grant of power was necessary to give the new governments authority to provide for the support of paupers in the poor-houses. That power is inherent, and exists in all governments as

among their implied powers and duties. By universal consent, taxes are valid when laid for the support of paupers, or those likely to become paupers. There was no necessity and no reason for inserting a provision in the State constitutions of North and South Dakota authorizing counties to loan their aid to maintain the almshouses. It would be absurd to assume that the framers of the constitutions and the people who adopted them intended by this provision to enable local municipalities to issue and sell bonds, and loan the proceeds to the inmates of the poorhouses; yet the power to loan aid in "support of the poor" is given. In our opinion, this power is conferred in the organic law expressly to meet the exigencies of the situation then existing, and that it is our duty to give it that effect. We believe, and so hold, that the class referred to in the exception contained in § 185 of the State Constitution is the poor and destitute farmers of the State, and that the first legislature which met after the State was admitted, has, by the seed-grain statute, put a proper construction upon the language in question. We therefore refuse to grant the writ applied for, and hold that the seed-grain statute is a valid enactment.¹ . . .

PERRY v. KEENE.

SUPREME COURT OF NEW HAMPSHIRE. 1876.

[56 N. H. 514.2]

Sargent and Chase and Hardy, for the plaintiffs. *Lane*, for the defendants. *C. H. Burns*, for the Manchester & Keene Railroad.

LADD, J. "Any town may, by a two-thirds vote, raise by tax or loan such sum of money as they shall deem expedient, not exceeding five per cent of the valuation thereof, . . . and appropriate the same to aid in the construction of any railroad in this State, in such manner as they shall deem proper." Gen. Stats., ch. 34, sec. 16. In accordance with the provisions of this statute, the inhabitants of the city of Keene have voted a subsidy equal to three per cent of their last property valuation, to aid in the construction of that part of the Manchester & Keene Railroad located between Greenfield and Keene. This sum, amounting to upwards of \$130,000, is called a "gratuity" in the vote. It is, in fact, an appropriation of that amount, to be raised by a public

¹ In *State v. Oswaukee Township*, 14 Kans. 418 (1875), in a similar case the court (BREWER, J.) held that provision for "the poor" must be limited to paupers, that the statute in question merely secured loans to persons temporarily embarrassed, that there was no public purpose, and that the argument that the prevention of pauperism was a public purpose is "dangerous and unsound." The cases of *Loan Assoc. v. Topoka*, 20 Wall. 655; *Allen v. Jay*, 60 Me. 124; and *Lowell v. Boston*, 111 Mass. 454, were cited. See *Curtis v. Whipple*, 18 Wis. 350 (1869). — ED.

² The statement of facts is omitted. — ED.

of \$130,000 to be raised by tax for building a railroad
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tax, to the purpose of building a railroad, with no equivalent except the expected benefits to be derived from the opening of such railroad. The plaintiffs, who are citizens and large tax-payers in Keene, contend that the legislature, in passing the Act quoted above, transcended the limits of their constitutional power; that the action of the city in voting the gratuity is therefore without warrant of law; and they ask for an injunction to prevent the issuing of bonds or the levy of taxes in accordance with said vote.

The question we are thus called upon to consider is an important one, not only in its legal aspects, but in its practical bearing upon the rights and interests of these parties, as well as others in a similar situation, both tax-payers and holders of municipal bonds heretofore issued for a like purpose under the authority of the Act in question.

In one view, the duty of the court is extremely plain and simple; in another, it is very delicate, and not free from difficulty. We have not to inquire into the policy of the law, or, if the purpose be admitted to be public, whether the supposed public good to be attained was sufficient to justify the legislature in conferring upon two-thirds of the legal voters of a town the power to devote not only their own property but that of the unwilling other third to such a purpose.

All mere questions of expediency, and all questions respecting the just operation of the law, within the limits prescribed by the Constitution, were settled by the legislature when it was enacted. The court have only to place the statute and the Constitution side by side, and say whether there is such a conflict between the two that they cannot stand together. { If, upon such examination, there appears to be a conflict, and if the conflict is so clear and palpable as to leave no reasonable doubt that the legislature have undertaken to do what they were prohibited from doing by the Constitution, the court cannot avoid the high though unwelcome duty of declaring the statute inoperative, because the Constitution, and not the statute, is the paramount law; and the court must interpret and administer all the laws alike. }

The learned counsel for the plaintiffs have not pointed out the particular part or clause of the Constitution which they say is violated by this statute. Their position, however, is, that the Act authorizes the taking of private property, under the name and guise of taxation, and appropriating it to a use that is really and essentially private; and that such a proceeding, being manifestly at war with those fundamental principles upon which the right of the citizen to be secure in the possession and enjoyment of his property depends, is in violation of all those provisions in the Constitution established to guard and perpetuate that right. The proposition assumes this form;—the legislature are forbidden by the Constitution to exact money from the people of the State under the name of taxes, and apply it to a private purpose: this statute authorizes the Act thus forbidden, and is therefore void. The first part of this proposition is admitted by the defendants, and so we need not now inquire in what particular provision of the Constitution

of opinion. Before this law could be declared unconstitutional the court must be satisfied beyond a reasonable doubt that the purpose

the inhibition is to be found. Whether it rests upon the commonly received meaning and definition of the terms taxes, rates, assessments, &c., used in the Constitution, and the general guaranties of private property contained in the bill of rights; or whether, by a fair construction of art. 5, the levying of all taxes, municipal as well as State, is limited to the purposes therein named, — *viz.*, for the public service, in the necessary defence and support of the government of this State, and the protection and preservation of the subjects thereof, — is at present immaterial, inasmuch as we are to start with the assumption that taxes cannot be imposed or authorized by the legislature for any other than a public purpose.

Is the building of a railroad a public purpose? The legislature have undoubtedly passed their judgment on that question, and determined that it is. It is not to be denied that the levying of taxes is specially and entirely a legislative function, and the court are not to encroach upon the province of a co-ordinate branch of the government in the exercise of that power. Where is the line that divides the province of the court from that of the legislature in a matter of this sort? The court is to expound and administer the laws, and there the judicial function and duty end. How much of the question, whether a given object is public, lies within the province of the law, and how much in the domain of political science and statesmanship? When the judge has declared all the law that enters into the problem, how much is still left to the determination of the legislator? Admitting, as has indeed been more than intimated in this State (*Concord Railroad v. Greeley*, 17 N. H. 57), that it is for the court finally to determine whether the use is public, — what is the criterion? What are the rules which the law furnishes to the court wherewith to eliminate a true answer to the inquiry? In what respect does the question as presented to the court differ from the same question as presented to the legislature? If the court stop when they reach the borders of legislative ground, how far can they proceed?

If the legislature should take the property of A, or the property of all the tax-payers in the town of A, and hand it over, without consideration, without pretence of any public obligation or duty, to B, to be used by him in buying a farm, or building a house, or setting himself up in business, the case would be so clear that the common-sense of every one would at once say the limits of legislative power had been overstepped by a taking of private property, and devoting it to a private use. That is the broad ground upon which such cases as *Allen v. Jay*, 60 Me. 124, *Lowell v. Boston*, 111 Mass. 454, and *The Citizens' Loan Association v. Topeka Sup. Ct. U. S.* (not yet reported) were decided. And yet, what rule of law do the courts find to aid them in thus revising the judgment of the legislature? Is it not clear that the question they pass upon is the same question as that decided by the legislature, and that they must determine it in the same way the legislature have done, simply by the exercise of reason and judgment? } What is it that settles

their proper limits. Is their view of the proper question a permissible view? That is the question for the court to determine.

the character of a given purpose, in respect of its being public or otherwise? It has been said that for the legislature to declare a use public does not make it so—17 N. H. 57; and the same may certainly be said with equal truth of a like declaration by the court. A judicial christening can no more affect the nature of the thing itself, than a legislative christening. Judging *a priori*, and without some knowledge of the wants of mankind when organized in communities and States, I do not quite understand how it could be predicated of any use, that it is "*per se*" public, as is said by Dixon, C. J., in *Whiting v. Sheboygan Railway Co.*, 9 Am. Law Reg. (N. S.) 161. Of light, air, water, etc., the common bounties of providence, it might, indeed, be said beforehand that they are in a very broad sense public; but it is not of such uses that we are speaking. Without knowledge of human nature, knowledge derived from experience and observation of what may be needful for the comfort, well-being, and prosperity of the people of a State advanced in civilization,—and knowledge, gained in the same way, as to what necessary conditions of their welfare will be supplied by private enterprise, and what will go unsupplied without interference by the State,—I do not see how any use could be said to be *per se* public, or how either a legislature, or a court, could form a judgment that would not be founded almost wholly upon theory and conjecture. No one doubts that the building and maintaining of our common highways is a public purpose. Why? Certainly for no other reason than that they furnish facilities for travel, the transmission of intelligence, and the transportation of goods. But why should the State take this matter under its fostering care, imposing upon the people a very great yearly burden in the shape of taxes for their support, any more than many others that might be mentioned, of equal and perhaps greater importance to its citizens? Is it of greater concern to the citizen that he should have a road to travel on, when he desires to visit his neighbor in the next town, or transport the products of his farm or of his factory to market and bring back the commodities for which they may be exchanged, than that he should have a mill to grind his corn,—a tanner, a shoemaker, and a tailor to manufacture his raw material into clothing, wherewith his body may be covered? Doubtless highways are a great public benefit. Without them I suppose the whole State would soon return to its primal condition of a howling wilderness, fit only for the habitation of wild beasts and savages. How would it be if there were no mills for the manufacture of lumber, no joiners or masons to build houses, no manufacturers of cloth, no merchants or tradesmen to assist in the exchange of commodities? These suppositions may appear somewhat fanciful, but they illustrate the inquiry. Why is the building of roads to be regarded as a public service, while many other things equally necessary for the upholding of life, the security of property, the preservation of learning, morality, and religion, are by common consent regarded as private, and so left to the private enterprise of the citizens? The answer to this question, surely, is not to be found in

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any abstract principle of law. <It is essentially a conclusion of fact and public policy, the result of an inquiry into the individual necessities of every member of the community (which in the aggregate show the character and urgency of the public need), and the likelihood that those necessities will be supplied without interference from the State. Obviously it bears a much closer resemblance to the deduction of a politician, than the application of a legal principle by a judge.> Should it be found by experience that no person in the State would, voluntarily and unaided, establish and carry on any given trade or calling, necessary, and universally admitted to be necessary, for the upholding of life, the preservation of health, the maintenance of decency, order, and civilization among the people, would not the carrying on of such necessary trade or calling thereupon become a public purpose, for which the legislature might lawfully impose a tax?

Experience shows that highways would not be built, or, if built, would not be located in the right places with reference to convenient transit between distant points, nor kept in suitable repair, but for the control assumed over the whole matter by the State; and so the State interferes, and establishes a system, and imposes an enormous burden upon the people in the shape of taxes, compelling them to supply themselves with what they certainly need, but need no more than they need shoes or bread, — and nobody ever complained that the interference was unauthorized, or the purpose other than a public one.

Enough has been said to show the delicate nature of the task imposed upon the court when they are called upon to revise the judgment of the legislature in a matter of this description. It is especially delicate for two reasons, — first, because the discretion of the legislature, with respect to the whole subject of levying taxes, is so very large, and their power so exclusive, that it is not always easy to say when the limits of that discretion and power have been passed; and, second, because the rule to be applied is furnished, not so much by the law as by those general considerations of public policy and political economy to which allusion has been made. I do not deny the power and duty of the court, when private rights of property are in question, to settle those rights according to a just interpretation of the Constitution; and the discharge of that duty may involve a revision of the judgment of the legislature upon a question which, like this, partakes more or less of a political character. But before the court can reverse the judgment of the legislature and the executive, and declare a statute levying or authorizing a tax to be inoperative and void, a very clear case must be shown. After the legislature and the executive have both decided that the purpose for which a tax is laid is public, nothing short of a moral certainty that a mistake has been made, can, in my judgment, warrant the court in overruling that decision, especially when nothing better can be set up in its place than the naked opinion of the court as to the character of the use proposed. Certainly it is not for the court to shrink from the discharge of a constitutional duty; but, at the same

time, it is not for this branch of the government to set an example of encroachment upon the province of the others. It is only the enunciation of a rule that is now elementary in the American States, to say that, before we can declare this law unconstitutional, we must be fully satisfied — satisfied beyond a reasonable doubt — that the purpose for which the tax is authorized is private and not public.

I have spoken incidentally of our common highways; and it has been said that their purpose is, to furnish to the public facilities for travel, for the transmission of intelligence, and the carrying of goods. No one will contend that to build and maintain them is not a public purpose. Indeed, the public nature of this use is so very obvious, that it has been classed among those said to be public *per se* (*Whiting v. Sheboygan Railway Co.*, *supra*), standing in need of no credentials from the court to entitle it to legislative recognition. Wherein does the use of a railroad differ? What public benefit can be mentioned, that comes from the building of a common road, that does not come, in kind if not in degree, from the building of a railroad? It is not necessary to enlarge upon the benefits of either: they are, doubtless, numerous and varied, — so numerous, indeed, so interwoven with everything that distinguishes an intelligent, virtuous, rich, well-organized, and well-governed State, from a tribe of primitive barbarians, that an attempt to trace them all would be little less than an attempt to search out the sources of our civilization. The point is, they are alike in kind; and when it is admitted that the construction of one class of roads is clearly, beyond all possibility of doubt, a public purpose, I cannot conceive upon what ground it is to be said that the construction of the other class is, beyond all reasonable doubt, a private purpose.

It is said that railroad corporations are private; that the roads are built and run for private gain; that the public can only enjoy the benefits offered by them upon payment of a toll, — and, therefore, their purpose is private. The short and conclusive answer to all this, in my mind, is, that the character of the agency employed does not and cannot determine the nature of the end to be secured. To say of a railroad corporation that it is a private corporation, and therefore the construction of a railroad is a private purpose, seems to me, in truth, no more logical, if less absurd, than to say of any officer or agent of the State, — He is an individual, with all the private interests and private associations of other citizens; therefore the purpose of his office and of all his official acts is private. The argument that because a toll is granted, therefore the purpose must be private, carried to its logical results, would certainly declare the purpose of a very large number of public offices in the State to be private, — among them the Secretary of State, justices of the peace and of police courts, registers of probate, registers of deeds, sheriffs, clerks of the courts, town-clerks, etc., etc.

If the purpose is public, it makes no difference that the agent by whose hand it is to be attained is private. Nor, if the purpose were private, would it make any difference that a public agent was employed.

The question, therefore, whether a railroad corporation is to be regarded as public, or private, or both, — that is, public in one aspect and private in another, — seems to me quite immaterial, and that the decision of that question one way or the other does not advance the inquiry we have in hand.

It has been admitted by some, who have maintained with singular ability and zeal the position of the plaintiffs in this case, that the State might legally take into its own hands the whole matter of railroads within its limits; might build, equip, operate, and control them, making use of no intermediate agents in the business, — because in that case the people would remain owners of the property into which their money had been converted. With great deference, it seems to me, this is a concession of the very point in dispute. The form of the argument seems to be this: The State cannot levy a tax for a private purpose. So much, all admit. The building of a railroad is a private purpose; but the State may nevertheless levy a tax to build a railroad, provided the tax be large enough to carry through the whole enterprise without calling in the aid of any other agency; — or, to draw from the same premises the conclusion sought to be established here, the State cannot levy a tax for a private purpose. The State may levy a tax to wholly build, equip, and run a railroad; therefore the building of a railroad is a private purpose. This does not bear examination.

Another argument may be noticed here. It has been said by courts, whose decisions we are accustomed to regard with great respect, that, admitting the power of the legislature to authorize towns and cities to subscribe for stock in railroad corporations, and issue bonds or levy taxes in payment thereof, it does not follow that they can lawfully authorize the direct appropriation of the public funds to aid in the construction of a railroad where no stock is taken; because, in that event, no interest or ownership results to the town in the property of the corporation, and no voice in the control and management of its affairs is secured. I do not understand how this can be said by a court of law. Upon what ground can the legislature authorize the raising of a tax to pay for stock in a corporation of any sort, unless the purchase of such stock will be a devotion of the public funds to a public service? It is a matter of common knowledge that the original stock in railroad corporations often becomes worthless, or nearly so; but whether such a result is to be apprehended or not, makes no difference, so far as I can see, with the argument. If the end in view is private and not public, the legislature might as well authorize a town to enter into copartnership with any private person, in the prosecution of any private enterprise or business, and furnish its stipulated proportion of the capital to be invested, by levying a tax, as to authorize it to purchase such stock, even were it likely to advance in value on their hands, and the people thus be gainers by the operation. Deny that the end is public, and at the same time admit that a tax may be levied for the purchase of the stock, and the inevitable conclusion appears to be, that towns may be

authorized to engage in the private and perilous business of dealing in stocks, and so apply the public funds to a purpose as remote as any that can well be conceived from that permitted by the Constitution, to say nothing of the fact that such investment must be made with a reasonable assurance that the money will be lost. Clearly, one or the other of these propositions must be changed; — either we must admit that the end in view is public, or deny the power to purchase stocks when the end in view is merely a private end.

It is said that the power to tax involves the power to destroy; and that this is true is well shown by the recent example of the State banks, whose existence was terminated by a tax of ten per cent imposed by Congress on their circulation. > But how does this strengthen the position of the plaintiffs? They say that if the legislature have the constitutional right and power to authorize a tax of three per cent to aid this railroad, they have the constitutional right and power to levy a tax upon all the property in the city of Keene equal to the full value of such property, and give that to the same road. Suppose this be granted, what does it prove as to the object for which the tax is laid? Is it not equally true that they might authorize a tax equal to the full value of all the property in the city for the support of the public schools, the public highways, or any other object of a confessedly public nature? The suggestion is plainly of no force in an inquiry as to the nature of the purpose for which a tax has been authorized or levied, for the reason that the supposed power of destruction is a necessary incident of the taxing power, and follows it whatever be the object for which it is put forth, whether public and legal, or private and illegal. It amounts to little more, in the present case, than the truism that any governmental power may be abused by the agent in whose hands it is reposed.

But if the question on which this case must turn has been rightly apprehended, I think it was decided more than thirty years ago, in the case of *Concord Railroad v. Greeley*, 17 N. H. 47, where it was held that a railroad is in general such a public use as affords just ground for the taking of private property, and appropriating it to that use. . . . [Here follows a consideration of certain legislation of New Hampshire, and of *Concord R. R. v. Greeley*.]

Undoubtedly a legislative declaration, that a given use is public, cannot be regarded as conclusive to all intents, without denying the power of the court to interpret the Constitution; nevertheless it is true, that the creator of a thing may generally impose upon the work of his own hands such qualities and characteristics as he chooses; — and when we see that the legislature, in establishing railroad corporations, has always been so careful, not only to bestow upon them attributes and powers consistent with no other idea than that their purpose is public, but to lay upon them also obligations and duties which would be clearly unjust and arbitrary in any other view; and when, in addition to this, we find the statutes full of declarations that the use is a public use, it

would seem that nothing which falls much short of absolute demonstration would warrant the court in holding that the use is, after all, private.

Thus far, indeed, the cases all agree. It is nowhere contended, and is not contended by the plaintiffs, that a railroad is not a public use in such sense that land, the private property of individuals, may be taken for its construction. But a strenuous effort has been made to distinguish between the nature of a public use that warrants the exercise of the power of eminent domain, and that which warrants the exercise of the taxing power in its behalf. Of course the use which warrants the taking of land for a road-bed must be public, otherwise every charter granting that right, and every general law recognizing its existence and regulating the mode of its exercise, has been nothing less than an arbitrary and despotic interference by the legislature with private rights of property, in flagrant violation of Art. 12 of the Bill of Rights, as well as the other provisions of the Constitution whereby those rights are secured. The argument, then, admits that the use is public, but holds that it is not sufficiently public, or is not public in the particular way, to bring it within the category of objects for which taxes may be imposed: either in degree or kind, the public quality which it confessedly possesses falls short of that required by the Constitution to justify an exercise of the taxing power.

It is incumbent on those who undertake to maintain this distinction, to point out clearly the differences on which it rests. An assertion that it does exist is not enough, nor is the argument advanced by a repetition of such assertion, even though made in confident and emphatic terms. What is the rule wherewith we are to determine when a given public use is of a character to warrant the exercise of one power and not the other? What is the principle to be applied? No one will contend that the power of eminent domain and the taxing power, though similar, are in all respects identical; but all agree that neither can be exercised except for a public end. Which is the higher power? or, in other words, which requires the greater public exigency to call it forth? What is the nature of those objects which lie on one side of the line, and what of those upon the other side? Where is the line to be drawn, and what are the reasons that determine its location? These are some of the questions not to be evaded, or met with much speech and ingenious ratiocination, but to be answered fairly and clearly, before a court can say that the legislature have beyond all reasonable doubt transcended their constitutional powers in declaring that a use which is of such character—that is, public in such sense that private property may be taken and appropriated in its behalf—is also public in such sense that taxes may be levied in its behalf. In those cases to which we have been referred by the plaintiffs' counsel, where an attempt to do this is made, it does appear to me the failure has been rendered only more conspicuous by the eminent ability of those who have undertaken the task. And, after a most careful ex-

amination of those cases, if we were to hold that a railroad, being a public use for which the land of individuals may be taken against their consent, is not a public purpose for which taxes may be imposed, I should be utterly at a loss what sound reason to give for the distinction, or in what terms to frame a rule to govern the future action of the legislature in cases of a like description.

Unless the court are to stand between the people and their representatives and declare when the latter have misjudged in their deliberations, and set up limits to the legislative powers of the General Court not found in the organic law of the State, it is clear to my mind that this law cannot be annulled by a judicial sentence or decree.

[SMITH, J., and RAND, J., gave concurring opinions.¹]

¹ See also *Sharpless v. Mayor of Phila.*, 21 Pa. 147 (1853), especially the opinion of BLACK, C. J.

In *R. R. Co. v. Otoe*, 16 Wall. 667 (1872), on a certificate of division from the United States Circuit Court of Nebraska, the court (STRONG, J.) said: "The first question upon which the judges of the Circuit Court divided was whether the Act of the Legislature of Nebraska, approved February 15th, 1869, authorizing the county of Otoe to issue bonds in aid of a railroad outside of the State, conflicts with the Constitution of that State.

"Unless we close our eyes to what has again and again been decided by this court, and by the highest courts of most of the States, it would be difficult to discover any sufficient reason for holding that this Act was transgressive of the power vested by the Constitution of the State in the legislature. That the legislative power of the State has been conferred generally upon the legislature is not denied, and that all such power may be exercised by that body, except so far as it is expressly withheld, is a proposition which admits of no doubt. It is true that, in construing the Federal Constitution, Congress must be held to have only those powers which are granted expressly or by necessary implication, but the opposite rule is the one to be applied to the construction of a State Constitution. The legislature of a State may exercise all powers which are properly legislative, unless they are forbidden by the State or National Constitution. This is a principle that has never been called in question. If, then, the Act we are considering was legislative in its character, it is incumbent upon those who deny its validity to show some prohibition in the Constitution of the State against such legislation. And that it was an exercise of legislative power is not difficult to maintain. No one questions that the establishment and maintenance of highways, and the opening facilities for access to markets, are within the province of every State legislature upon which has been conferred general legislative power. These things are necessarily done by law. The State may establish highways or avenues to markets by its own direct action, or it may empower or direct one of its municipal divisions to establish them, or to assist in their construction. Indeed, it has been by such action that most of the highways of the country have come into existence. They owe their being either to some general enactment of a State legislature or to some law that authorized a municipal division of the State to construct and maintain them at its own expense. They are the creatures of law, whether they are common county or township roads, or turnpikes, or canals, or railways. And that authority given to a municipal corporation to aid in the construction of a turnpike, canal, or railroad is a legitimate exercise of legislative power, unless the power be expressly denied, is not only plain in reason, but it is established by a number and weight of authorities beyond what can be adduced in support of almost any other legal proposition. The highest courts of the States have affirmed it in nearly a hundred decisions, and this court has asserted the same doctrine nearly a score of times. It is no longer open to debate. . . . [It is then pointed out that the Constitution of Nebraska does not forbid this.]

"It is urged, however, against the validity of the Act now under consideration that

it authorized a donation of the county bonds to the railroad company, and it is insisted that if even the legislature could empower the county to subscribe to the stock of such a corporation, it could not constitutionally authorize a donation. Yet there is no solid ground of distinction between a subscription to stock and an appropriation of money or credit. Both are for the purpose of aiding in the construction of the road; both are aimed at the same object, securing a public advantage, obtaining a highway or an avenue to the markets of the country; both may be equally burdensome to the tax-payers of the county. The stock subscribed for may be worthless, and known to be so. That the legislature of the State might have granted aid directly to any railroad company by actual donation of money from its treasury will not be controverted. No one questions that in the absence of some constitutional inhibition the power of a State to appropriate its money, however raised, is limited only by the sense of justice and by the sound discretion of its legislature. If the power to tax be unrestricted, the power to appropriate the taxes is necessarily equally so. Accordingly nothing has been more common in the State and Federal governments than appropriations of public money raised by taxation to objects, in regard to which no legal liability has existed. State legislatures have made donations for numerous purposes, wherever, in their judgment, the public well-being required them, and the right to make such gifts has never been seriously questioned. As has been said, the security against abuse of power by a legislature in this direction is found in the wisdom and sense of propriety of its members, and in their responsibility to their constituents. But if a State can directly levy taxes to make donations to improvement companies, or to other objects which, in the judgment of its legislature, it may be well to aid, it will be found difficult to maintain that it may not confer upon its municipal divisions power to do the same thing. Counties, cities, and towns exist only for the convenient administration of the government. Such organizations are instruments of the State, created to carry out its will. When they are authorized or directed to levy a tax, or to appropriate its proceeds, the State through them is doing indirectly what it might do directly. It is true the burden of the duty may thus rest upon only a single political division, but the legislature has undoubted power to apportion a public burden among all the tax-payers of the State, or among those of a particular section. In its judgment, those of a single section may reap the principal benefit from a proposed expenditure, as from the construction of a road, a bridge, an almshouse, or a hospital. It is not unjust, therefore, that they should alone bear the burden. This subject has been so often discussed, and the principles we have asserted have been so thoroughly vindicated, that it seems to be needless to say more, or even to refer at large to the decisions. A few only are cited. *Blanding v. Burr*, 13 California, 343; *The Town of Guilford v. The Supervisors of Chenango County*, 3 Kernan, 149; *Stuart v. Supervisors*, 30 Iowa, 9; *Augusta Bank v. Augusta*, 49 Maine, 507; *Railroad Co. v. Smith*, a case decided by the Supreme Court of Illinois and not reported.

"One other objection to the constitutionality of the Act is urged. It is that it authorized aid to a railroad beyond the limits of the county, and outside the State. There is nothing in this objection. It was for the legislature to determine whether the object to be aided was one in which the people of the State had an interest, and it is very obvious that the interests of the people of Otoe County may have been more involved in the construction of a road giving them a connection with an eastern market than they could be in the construction of any road wholly within the county. But that the objection has no weight may be seen in *Gelpcke v. Dubuque*, 1 Wallace, 175, and in *Walker v. Cincinnati*, 21 Ohio, 14.

"We conclude, therefore, that the Act of the Legislature of February 15th, 1869, is not in conflict with the Constitution of the State."

In *Olcott v. The Supervisors*, 16 Wall. 678 (1872), the same doctrine was laid down.

In both these cases, CHASE, C. J., and JUSTICES MILLER and DAVIS, dissented. Compare *Cooley*, Const. Lim. (6th ed.) 264 n. who refers to express prohibitions upon such legislation in some of the newer constitutions. For the principles governing the general question, see *Cooley*, Const. Lim. (6th ed.), 598 et seq. (1890). Judge Cooley himself, in 1870, speaking for the Supreme Court of Michigan, held such proceedings unconstitutional. *People v. Salem*, 20 Mich. 452, 472. — Ed.

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LEGISLATURE CASE OF THE STATE TAX ON FOREIGN-HELD BONDS.

the C. P. & A. SUPREME COURT OF THE UNITED STATES. 1872.

[15 Wall. 300.]

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ERROR to the Supreme Court of Pennsylvania; the case being thus: The plaintiff in error, in this case, the Cleveland, Painesville, and Ashtabula Railroad Company, was incorporated by an Act of the Legislature of Ohio, passed in 1848, and authorized to construct a railroad from the city of Cleveland, in that State, to the line of the State of Pennsylvania. Under this Act and its supplement, passed in 1850, the road was constructed. By an Act of the Legislature of Pennsylvania, passed in 1854, the company was authorized to construct a railroad from the city of Erie, in that State, to the State line of Ohio, so as to connect with this road from Cleveland, and also to purchase a railroad already constructed between those points. This grant of authority was subject to various conditions, which the company accepted, and under its provisions the road between the points designated was constructed, or the one already constructed was purchased, and connected with the road from Cleveland, so that the two roads together formed one continuous line between the cities of Cleveland and Erie. The whole road between those places was ninety-five and a half miles in length, of which twenty-five miles and a half were situated in the State of Pennsylvania, and the rest, seventy miles, were situated in the State of Ohio. The company, so far as it acted in Pennsylvania under the authority of the Act of her legislature, has been held by her courts to be a separate corporation of that State, and as such subject to her laws for the taxation of incorporated companies. 29 Penn. St. 781. But there was only one board of directors, who managed the affairs of both companies as one company, and had the entire control of the whole road between Cleveland and Erie.

In 1868 the funded debt of the company amounted to \$2,500,000, and was in bonds of the company, secured by three mortgages, one for \$500,000, made in 1854, one for \$1,000,000, made in 1859, and one for \$1,000,000, made in 1867. Each of the mortgages was executed upon the entire road, from Erie, in Pennsylvania, to Cleveland, in Ohio, including the right of way and all the buildings and other property of every kind connected with the road. The principal and interest of the bonds first issued were payable in the city of Philadelphia; the principal and interest of the other bonds were payable in the city of New York. All the bonds were executed and delivered in Cleveland, Ohio, and nearly all of them were issued to, and have been ever since held and owned by non-residents of Pennsylvania and citizens of other States. The interest was at 7 per cent.

On the 1st of May, 1868, the Legislature of the State of Pennsylvania passed an Act entitled "An Act to Revise, Amend, and Consolidate

on every dollar of interest paid and should pay
semi-annually this tax to the Commonwealth.

the Several Laws taxing Corporations, Brokers, and Bankers;" the eleventh section of which provided as follows:

"The president, treasurer, or cashier of every company, except banks or savings institutions, incorporated under the laws of this Commonwealth, doing business in this State, which pays interest to its bondholders or other creditors, shall, before the payment of the same, retain, from said bond-holders or creditors, a tax of five per centum upon every dollar of interest paid as aforesaid; and shall pay over the same semi-annually, on the first days of July and January in each and every year, to the State treasurer for the use of the Commonwealth; and every president, treasurer, or cashier as aforesaid shall annually, on the thirty-first day of each December, or within thirty days thereafter, report to the auditor-general, under oath or affirmation, stating the entire amount of interest paid by said corporation to said creditors during the year ending on that day; and thereupon the auditor-general and State treasurer shall proceed to settle an account with said corporation as other accounts are now settled by law."

The treasurer of the company, under this Act, made a report in May, 1869, showing that during the previous year the company had paid interest on its funded debt of \$2,500,000, at the rate of 7 per cent, amounting to \$175,000. Upon this report the auditor-general and State treasurer "settled an account" against the company, finding that it owed to the State the sum of \$2,336.50 for the tax on the interest which the company had paid.

In reaching this conclusion these officers apportioned the interest upon the debt owing by the company according to the length of the road, assigning to the part in the State of Pennsylvania an amount in proportion to the whole indebtedness which that part bears to the whole road. There was no law, however, in existence at the time directing or authorizing this proceeding.

From the settlement thus made the company appealed, under the law of the State, to the Court of Common Pleas of one of her counties, specifying various objections to the settlement, and among others substantially the following:

That the greater portion of the bonds of the company having been issued upon loans made and payable out of the State, to non-residents of Pennsylvania, citizens of other States, and being held by them, the Act in question, in authorizing the tax upon the interest stipulated in the bonds, so far as it applied to the bonds thus issued and held, impaired the obligation of the contracts between the bond-holders and the company, and is therefore repugnant to the Constitution of the United States, and void.

The contest in the Court of Common Pleas took the form of a regular judicial proceeding, a declaration having been filed by the Attorney-General on behalf of the State against the company as for a debt, and the company having joined issue by a plea of non-assumpsit and payment. The Common Pleas sustained the validity of the alleged tax

a Mortgage is a lien and not a legal interest in the land. So the non resident owner of a bond

against the objections of the company, and verdict and judgment passed in favor of the State. On error to the Supreme Court of the State the judgment was affirmed, and the case is brought here for review under the second section of the amendatory Judiciary Act of 1867.

The judgment of the Supreme Court of Pennsylvania in the case now brought here, was rested, it may be well to say, upon a prior decision of that court; one made in *Malby v. Reading and Columbia Railroad Co.*, 52 Penn. St. 140. . . . [Here follows a statement of this case and a long quotation from the opinion.]

Messrs J. E. Gowen and J. W. Simonton, for the plaintiff in error. *Messrs. F. Carroll Brewster and J. W. M. Newlin*, contra.

MR. JUSTICE FIELD, after stating the facts of the case, delivered the opinion of the court as follows:

The question presented in this case for our determination is whether the eleventh section of the Act of Pennsylvania of May, 1868, so far as it applies to the interest on bonds of the railroad company, made and payable out of the State, issued to and held by non-residents of the State, citizens of other States, is a valid and constitutional exercise of the taxing power of the State, or whether it is an interference, under the name of a tax, with the obligation of the contracts between the non-resident bond-holders and the corporation. If it be the former, this court cannot arrest the judgment of the State court; if it be the latter, the alleged tax is illegal, and its enforcement can be restrained.

The case before us is similar in its essential particulars to that of *The Railroad Company v. Jackson*, reported in 7th Wallace. There, as here, the company was incorporated by the legislatures of two States, Pennsylvania and Maryland, under the same name, and its road extended in a continuous line from Baltimore in one State to Sunbury in the other. And the company had issued bonds for a large amount, drawing interest, and executed a mortgage for their security upon its entire road, its franchises and fixtures, including the portion lying in both States. Coupons for the different instalments of interest were attached to each bond. There was no apportionment of the bonds to any part of the road lying in either State. The whole road was bound for each bond. The law of Pennsylvania, as it then existed, imposed a tax on money owing by solvent debtors of three mills on the dollar of the principal, payable out of the interest. An alien resident in Ireland was the holder of some of the bonds of the railroad company, and when he presented his coupons for the interest due thereon, the company claimed the right to deduct the tax imposed by the law of Pennsylvania, and also an alleged tax to the United States. The non-resident refused to accept the interest with these deductions, and brought suit for the whole amount in the Circuit Court of the United States for the District of Maryland. That court, the Chief Justice presiding, instructed the jury that if the plaintiff, when he purchased the bonds, was a British subject, resident in Ireland, and still resided

This case did not come up on the ground of the character of the parties but

there, he was entitled to recover the amount of the coupons without deduction. The verdict and judgment were in accordance with this instruction, and the case was brought here for review.

This court held that the tax under the law of Pennsylvania could not be sustained, as to permit its deduction from the coupons held by the plaintiff would be giving effect to the Acts of her legislature upon property and effects lying beyond her jurisdiction. The reasoning by which the learned justice, who delivered the opinion of the court, reached this conclusion, may be open, perhaps, to some criticism. It is not perceived how the fact that the mortgage given for the security of the bonds in that case covered that portion of the road which extended into Maryland could affect the liability of the bonds to taxation. If the entire road upon which the mortgage was given had been in another State, and the bonds had been held by a resident of Pennsylvania, they would have been taxable under her laws in that State. It was the fact that the bonds were held by a non-resident which justified the language used, that to permit a deduction of the tax from the interest would be giving effect to the laws of Pennsylvania upon property beyond her jurisdiction, and not the fact assigned by the learned justice. The decision is, nevertheless, authority for the doctrine that property lying beyond the jurisdiction of the State is not a subject upon which her taxing power can be legitimately exercised. Indeed, it would seem that no adjudication should be necessary to establish so obvious a proposition.

The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State. These subjects are persons, property, and business. Whatever form taxation may assume, whether as duties, imposts, excises, or licenses, it must relate to one of these subjects. It is not possible to conceive of any other, though as applied to them, the taxation may be exercised in a great variety of ways. It may touch property in every shape, in its natural condition, in its manufactured form, and in its various transmutations. And the amount of the taxation may be determined by the value of the property, or its use, or its capacity, or its productiveness. It may touch business in the almost infinite forms in which it is conducted, in professions, in commerce, in manufactures, and in transportation. Unless restrained by provisions of the Federal Constitution, the power of the State as to the mode, form, and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction.

Corporations may be taxed, like natural persons, upon their property and business. But debts owing by corporations, like debts owing by individuals, are not property of the debtors in any sense; they are obligations of the debtors, and only possess value in the hands of the creditors. With them they are property, and in their hands they may be taxed. To call debts property of the debtors is simply to misuse terms. All the property there can be in the nature of things in debts

arbitrary taxation — that this would be so arbitrary that anyone can disregard it.

The question in this case. Can a court say

of corporations, belongs to the creditors, to whom they are payable, and follows their domicile, wherever that may be. Their debts can have no locality separate from the parties to whom they are due. This principle might be stated in many different ways, and supported by citations from numerous adjudications, but no number of authorities, and no forms of expression, could add anything to its obvious truth, which is recognized upon its simple statement.

The bonds issued by the railroad company in this case are undoubtedly property, but property in the hands of the holders, not property of the obligors. So far as they are held by non-residents of the State, they are property beyond the jurisdiction of the State. The law which requires the treasurer of the company to retain five per cent of the interest due to the non-resident bond-holder is not, therefore, a legitimate exercise of the taxing power. It is a law which interferes between the company and the bond-holder, and under the pretence of levying a tax commands the company to withhold a portion of the stipulated interest and pay it over to the State. It is a law which thus impairs the obligation of the contract between the parties. The obligation of a contract depends upon its terms and the means which the law in existence at the time affords for its enforcement. A law which alters the terms of a contract by imposing new conditions, or dispensing with those expressed, is a law which impairs its obligation, for, as stated on another occasion, such a law relieves the parties from the moral duty of performing the original stipulations of the contract, and it prevents their legal enforcement. The Act of Pennsylvania of May 1st, 1868, falls within this description. It directs the treasurer of every incorporated company to retain from the interest stipulated to its bond-holders five per cent upon every dollar and pay it into the treasury of the Commonwealth. It thus sanctions and commands a disregard of the express provisions of the contracts between the company and its creditors. It is only one of many cases where, under the name of taxation, an oppressive exaction is made without constitutional warrant, amounting to little less than an arbitrary seizure of private property. It is, in fact, a forced contribution levied upon property held in other States, where it is subjected, or may be subjected, to taxation upon an estimate of its full value.

The case of *Mulhby v. The Reading and Columbia Railroad Company*, decided by the Supreme Court of Pennsylvania in 1866, was referred to by the Common Pleas in support of its ruling, and is relied upon by counsel in support of the tax in question. The decision in that case does go to the full extent claimed, and holds that bonds of corporations held by non-residents are taxable in that State. But it is evident from a perusal of the opinion of the court that the decision proceeded upon the idea that the bond of the non-resident was itself property in the State because secured by a mortgage on property there. "It is undoubtedly true," said the court, "that the Legislature of Pennsylvania cannot impose a personal tax upon the citizen of

another State, but the constant practice is to tax property within our jurisdiction which belongs to non-residents." And again: "There must be jurisdiction over either the property or the person of the owner, else the power cannot be exercised; but when the property is within our jurisdiction, and enjoys the protection of our State government, it is justly taxable, and it is of no moment that the owner, who is required to pay the tax, resides elsewhere." There is no doubt of the correctness of these views. But the court then proceeds to state that the principle of taxation as the correlative of protection is as applicable to a non-resident as to a resident; that the loan to the non-resident is made valuable by the franchises which the company derived from the Commonwealth, and as an investment rests upon State authority, and, therefore, ought to contribute to the support of the State government. It also adds that, though the loan is for some purposes subject to the law of the domicile of the holder, "yet, in a very high sense," it is also property in Pennsylvania, observing, in support of this position, that the holder of a bond of the company could not enforce it except in that State, and that the mortgage given for its security was upon property and franchises within her jurisdiction. The amount of all which is this: that the State which creates and protects a corporation ought to have the right to tax the loans negotiated by it, though taken and held by non-residents, a proposition which it is unnecessary to controvert. The legality of a tax of that kind would not be questioned if in the charter of the company the imposition of the tax were authorized, and in the bonds of the company, or its certificates of loan, the liability of the loan to taxation were stated. The tax in that case would be in the nature of a license tax for negotiating the loan, for in whatever manner made payable it would ultimately fall on the company as a condition of effecting the loan, and parties contracting with the company would provide for it by proper stipulations. But there is nothing in the observations of the court, nor is there anything in the opinion, which shows that the bond of the non-resident was property in the State, or that the non-resident had any property in the State which was subject to taxation within the principles laid down by the court itself, which we have cited.

The property mortgaged belonged entirely to the company, and so far as it was situated in Pennsylvania was taxable there. If taxation is the correlative of protection, the taxes which it there paid were the correlative for the protection which it there received. And neither the taxation of the property, nor its protection, was augmented or diminished by the fact that the corporation was in debt or free from debt. The property in no sense belonged to the non-resident bond-holder or to the mortgagee of the company. The mortgage transferred no title; it created only a lien upon the property. Though in form a conveyance, it was both at law and equity a mere security for the debt. That such is the nature of a mortgage in Pennsylvania has been frequently ruled by her highest court. In *Witmer's Appeal*, 45 Penn. St. 463,

the court said: "The mortgagee has no estate in the land, any more than the judgment creditor. Both have liens upon it, and no more than liens." And in that State all possible interests in lands, whether vested or contingent, are subject to levy and sale on execution, yet it has been held, on the ground that a mortgagee has no estate in the lands, that the mortgaged premises cannot be taken in execution for his debt. In *Rickert v. Madeira*, 1 Rawle, 329, the court said: "A mortgage must be considered either as a chose in action or as giving title to the land and vesting a real interest in the mortgagee. In the latter case it would be liable to execution; in the former it would not, as it would fall within the same reason as a judgment bond or simple contract. If we should consider the interest of the mortgagee as a real interest, we must carry the principle out and subject it to a dower and to the lien of a judgment; and that it is but a chose in action, a mere evidence of debt, is apparent from the whole current of decisions." *Wilson v. Shoenberger's Executors*, 31 Penn. St. 295.

Such being the character of a mortgage in Pennsylvania, it cannot be said, as was justly observed by counsel, that the non-resident holder and owner of a bond secured by a mortgage in that State owns any real estate there. A mortgage being there a mere chose in action, it only confers upon the holder, or the party for whose benefit the mortgage is given, a right to proceed against the property mortgaged, upon a given contingency, to enforce, by its sale, the payment of his demand. This right has no locality independent of the party in whom it resides. It may undoubtedly be taxed by the State when held by a resident therein, but when held by a non-resident it is as much beyond the jurisdiction of the State as the person of the owner.

It is undoubtedly true that the actual *situs* of personal property which has a visible and tangible existence, and not the domicile of its owner, will, in many cases, determine the State in which it may be taxed. The same thing is true of public securities consisting of State bonds and bonds of municipal bodies, and circulating notes of banking institutions: the former, by general usage, have acquired the character of, and are treated as, property in the place where they are found, though removed from the domicile of the owner; the latter are treated and pass as money wherever they are. But other personal property, consisting of bonds, mortgages, and debts generally, has no *situs* independent of the domicile of the owner, and certainly can have none where the instruments, as in the present case, constituting the evidences of debt, are not separated from the possession of the owners.

Cases were cited by counsel on the argument from the decisions of the highest courts of several States, which accord with the views we have expressed. In *Davenport v. The Mississippi and Missouri Railroad Company*, 12 Iowa, 539, the question arose before the Supreme Court of Iowa whether mortgages on property in that State held by non-residents could be taxed under a law which provided that all property, real and personal, within the State, with certain exceptions not

material to the present case, should be subject to taxation, and the court said:

“Both in law and equity the mortgagee has only a chattel interest. It is true that the *situs* of the property mortgaged is within the jurisdiction of the State, but, the mortgage itself being personal property, a chose in action, attaches to the person of the owner. > It is agreed by the parties that the owners and holders of the mortgages are non-residents of the State. If so, and the property of the mortgage attaches to the person of the owner, it follows that these mortgages are not property within the State, and if not they are not the subject of taxation.”

In *People v. Eastman*, 25 Cal. 603, the question arose before the Supreme Court of California whether a judgment of record in Mariposa County upon the foreclosure of a mortgage upon property situated in that county could be taxed there, the owner of the judgment being a resident of San Francisco, and the law of California requiring all property to be taxed in the county where situated; and it was held that it was not taxable there. “The mortgage,” said the court, “has no existence independent of the thing secured by it; a payment of the debt discharges the mortgage. The thing secured is intangible, and has no *situs* distinct and apart from the residence of the holder. It pertains to and follows the person. . The same debt may, at the same time, be secured by a mortgage upon land in every county in the State; and if the mere fact that the mortgage exists in a particular county gives the property in the mortgage a *situs* subjecting it to taxation in that county, a party, without further legislation, might be called upon to pay the tax several times, for the lien for taxes attaches at the same time in every county in the State, and the mortgage in one county may be a different one from that in another, although the debt secured is the same.”

Some adjudications in the Supreme Court of Pennsylvania were also cited on the argument, which appear to recognize doctrines inconsistent with that announced in *Miltby v. Reading and Columbia Railroad Company*, particularly the case of *McKean v. The County of Northampton*, 49 Penn. St. 519, and the case of *Short's Estate*, 16 Id. 63, but we do not deem it necessary to pursue the matter further. We are clear that the tax cannot be sustained; that the bonds, being held by non-residents of the State, are only property in their hands, and that they are thus beyond the jurisdiction of the taxing power of the State. Even where the bonds are held by residents of the State the retention by the company of a portion of the stipulated interest can only be sustained as a mode of collecting a tax upon that species of property in the State. When the property is out of the State there can then be no tax upon it for which the interest can be retained. The tax laws of Pennsylvania can have no extra-territorial operation; nor can any law of that State inconsistent with the terms of a contract, made with or payable to parties out of the State, have any effect upon the

contract whilst it is in the hands of such parties or other non-residents. The extra-territorial invalidity of State laws discharging a debtor from his contracts with citizens of other States, even though made and payable in the State after the passage of such laws, has been judicially determined by this court. *Ogden v. Saunders*, 12 Wheaton, 214; *Baldwin v. Hale*, 1 Wallace, 223. A like invalidity must, on similar grounds, attend State legislation which seeks to change the obligation of such contracts in any particular, and on stronger grounds where the contracts are made and payable out of the State.

Judgment reversed, and the cause remanded for further proceedings, in conformity with this opinion.

MR. JUSTICE DAVIS, with whom concurred JUSTICES CLIFFORD, MILLER, and HUNT, dissenting.¹

¹ See their opinion, *infra*, note following.

At the same time with the adjudication as to the tax in the preceding case was adjudged the validity [*sic*] of the tax in the cases of two other railroad companies, to wit The Pittsburg, Fort Wayne, and Chicago; and the Delaware, Lackawanna, and Western, both writs of error against the State of Pennsylvania, and to judgments of the Supreme Court of that State. The tax levied in these last two cases upon the bonds of non-residents of the State was three mills on the dollar of capital, to be paid out of the interest; and the law laying the tax, a law of 1844, was in existence when the bonds were issued. In the previous case it will be remembered that the tax levied was five per cent upon the interest of the bonds, and the law levying it was not in such existence. The last two cases, therefore, resembled the case of *Malby v. Reading and Columbia Railroad*, the particulars of which are stated *supra* [15 Wall.], 303-307.

MR. JUSTICE FIELD, who delivered the judgment of the court, in the additional two cases now mentioned, as in the first one, said that the cases involved the same questions that had been considered and decided in the previous case, that of the Cleveland, Painesville, and Ashtabula Railroad; and that "the difference in the mode of the assessment of the tax did not affect the principle decided."

Upon the authority of the case cited, the judgments in these two cases, now mentioned, were accordingly reversed, and the causes remanded for further proceedings, JUSTICES CLIFFORD, MILLER, DAVIS, and HUNT dissenting; and MR. JUSTICE DAVIS saying, for himself and them, in all the cases, as follows:

"I cannot agree to the opinion of a majority of my brethren in these cases. That the tax in question is valid and binding, both on the corporation and its creditor, is clearly settled in *Malby v. The Philadelphia and Reading Railroad Company*, and that, too, whether the creditor resides in Pennsylvania or elsewhere. As the highest court of the State has decided that the Act of 1844 authorized the imposition of the tax in controversy, and as that Act was in force when the bonds and mortgages were issued, I cannot see how any principle of the Federal Constitution is violated, nor can I see how this court can reach the conclusion it does in these cases without denying to the State government the right to construe its own local laws. This right has been recognized so often and in such a variety of ways, that it is no longer an open question. Indeed this court in *Railroad Company v. Jackson* has expressly recognized the binding force of the construction which the Supreme Court in Pennsylvania has put on the Act of 1844. Mr. Justice Nelson, delivering the opinion of the court, said:

"It has been argued for the plaintiff, that the Acts of the Legislature of Pennsylvania, when properly interpreted, do not embrace the bonds or coupons in question; but it is not important to examine the subject, for it is not to be denied, as the courts of the State have expounded these laws, that they authorized the deduction, and, if no other objection existed against the tax, the defence would fail.

"I am also of opinion that a State legislature is not restrained by anything in

the Federal Constitution nor by any principle which this court can enforce against the State court, from taxing the property of persons which it can reach and lay its hands on, whether these persons reside within or without the State." — [Reporter's note]

Compare *R. A. Co. v. Jackson*, 7 Wall. 262; *U. S. v. R. R. Co.*, 17 Wall. 322; *Com. v. Lehigh Val. R. Co.*, 129 Pa. 429, 456 (1889). See also *Jenkins v. Charleston*, 5 So. Ca. 393 (1874), holding that the city of Charleston could tax its own stock, whether owned by residents or non-residents; overruled in 96 U. S. 449, on the doctrine of *Murray v. Charleston*, 96 U. S. 432; *Com. v. Ham. Man. Co.*, 12 Allen, 298 (1866); *Oliver v. Wash. Mills*, 11 Allen, 268, 270-271 (1865).

In *Murray v. Charleston*, 96 U. S. 432 (1877), it was held that the defendant could not treat a non-resident owner of its securities as thereby having property in its limits, which might be taxed; that such taxation was invalid as impairing the obligation of the contract.

In *Tappan v. Merch. Bank*, 19 Wall. 490 (1873), CHASE, C. J., for the court, said: "We are called upon in this case to determine whether the General Assembly of the State of Illinois could, in 1867, provide for the taxation of the owners of shares of the capital stock of a national bank in that State, at the place, within the State, where the bank was located, without regard to their places of residence. . . .

"The power of taxation by any State is limited to persons, property, or business within its jurisdiction. State Tax on Foreign-held Bonds (*Railroad v. Pa.*), 15 Wall. 319. Personal property, in the absence of any law to the contrary, follows the person of the owner, and has its *situs* at his domicile. But, for the purposes of taxation, it may be separated from him, and he may be taxed on its account at the place where it is actually located. These are familiar principles, and have been often acted upon in this court and in the courts of Illinois. If the State has actual jurisdiction of the person of the owner, it operates directly upon him. If he is absent, and it has jurisdiction of his property, it operates upon him through his property.

"Shares of stock in national banks are personal property. They are made so in express terms by the Act of Congress under which such banks are organized. 13 Stat. at Large, 102, § 12. They are a species of personal property which is, in one sense, intangible and incorporeal, but the law which creates them may separate them from the person of their owner for the purposes of taxation, and give them a *situs* of their own. This has been done. By section forty-one of the National Banking Act, it is in effect provided that all shares in such banks, held by any person or body corporate, may be included in the valuation of the personal property of such person or corporation in the assessment of taxes imposed under State authority, at the place where the bank is located, and not elsewhere. 13 Stat. at Large, 112. This is a law of the property. Every owner takes the property subject to this power of taxation under State authority, and every non-resident, by becoming an owner, voluntarily submits himself to the jurisdiction of the State in which the bank is established for all the purposes of taxation on account of his ownership. His money invested in the shares is withdrawn from taxation under the authority of the State in which he resides, and submitted to the taxing power of the State where, in contemplation of the law, his investment is located. The State, therefore, within which a national bank is situated has jurisdiction, for the purposes of taxation, of all the shareholders of the bank, both resident and non-resident, and of all its shares, and may legislate accordingly." — ED.

KIRTLAND v. HOTCHKISS.

SUPREME COURT OF THE UNITED STATES. 1879.

[100 U. S. 491.]

ERROR to the Supreme Court of Errors, Litchfield County, State of Connecticut.

Charles W. Kirtland, a citizen of Connecticut, instituted this action for the purpose of restraining the enforcement of certain tax-warrants levied upon his real estate in the town in which he resided, in satisfaction of certain State taxes, assessed against him for the years 1869 and 1870. The assessment was by reason of his ownership, during those years, of certain bonds, executed in Chicago, and made payable to him, his executors, administrators, or assigns in that city, at such place as he or they should by writing appoint, and in default of such appointment, at the Manufacturers' National Bank of Chicago. Each bond declared that "it is made under, and is, in all respects, to be construed by the laws of Illinois, and is given for an actual loan of money, made at the City of Chicago, by the said Charles W. Kirtland to the said Edwin A. Cummins, on the day of the date hereof." They were secured by deeds of trust, executed by the obligor to one Perkins of that city, upon real estate there situated, the trustee having power by the terms of the deed to sell and convey the property and apply the proceeds in payment of the loan, in case of default on the part of the obligor to perform the stipulations of the bond.

The statute of Connecticut, under which the assessment was made, declares, among other things, that personal property in that State "or elsewhere" should be deemed, for purposes of taxation, to include all moneys, credits, choses in action, bonds, notes, stocks (except United States stocks), chattels, or effects, or any interest thereon; and that such personal property or interest thereon, being the property of any person resident in the State, should be valued and assessed at its just and true value in the tax-list of the town where the owner resides. The statute expressly exempts from its operation money or property actually invested in the business of merchandizing or manufacturing, when located out of the State. Conn. Revision of 1866, p. 709, tit. 64, c. 1, sect. 8. The court below held that the assessments complained of were in conformity to the State law, and that the law itself did not infringe any constitutional right of the plaintiff.

This writ of error is prosecuted by Kirtland upon the ground, among others, that the statute of Connecticut thus interpreted and sustained is repugnant to the Constitution of the United States.

Mr. Ashbel Green, Mr. William Cothren, and Mr. Julien T. Davies, for the plaintiff in error. *Mr. Morris W. Seymour, contra.*

MR. JUSTICE HARLAN, after stating the case, delivered the opinion of the Court.

We will not follow the interesting argument of counsel by entering upon an extended discussion of the principles upon which the power of taxation rests under our system of constitutional government. Nor is it at all necessary that we should now attempt to state all limitations which exist upon the exercise of that power, whether they arise from the essential principles of free government or from express constitutional provisions. We restrict our remarks to a single question, the precise import of which will appear from the preceding statement of the more important facts of this case.

In *M'ulloch v. State of Maryland*, 4 Wheat. 428, this court considered very fully the nature and extent of the original right of taxation which remained with the States after the adoption of the Federal Constitution. It was there said "that the power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable to the utmost extent to which the government may choose to carry it." Tracing the right of taxation to the source from which it was derived, the court further said: "It is obvious that it is an incident of sovereignty, and is co-extensive with that to which it is an incident. All subjects over which the sovereign power of a State extends are objects of taxation, but those over which it does not extend are, upon the soundest principles, exempt from taxation."

"This vital power," said this court in *Providence Bank v. Billings*, 4 Pet. 563, "may be abused; but the Constitution of the United States was not intended to furnish the corrective for every abuse of power which may be committed by the State governments. The interest, wisdom, and justice of the representative body, and its relations with its constituents, furnish the only security, when there is no express contract, against unjust and excessive taxation, as well as against unwise legislation."

In *St. Louis v. The Ferry Company*, 11 Wall. 423, and in *State Tax on Foreign-held Bonds*, 15 Id. 300, the language of the court was equally emphatic. In the last-named case we said that, "unless restrained by provisions of the Federal Constitution, the power of the State as to the mode, form, and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction."

We perceive no reason to modify the principles announced in these cases or to question their soundness. They are fundamental and vital in the relations which, under the Constitution, exist between the United States and the several States. Upon their strict observance depends, in no small degree, the harmonious and successful working of our complex system of government, Federal and State. It may, therefore, be regarded as the established doctrine of this court, that so long as the State, by its laws, prescribing the mode and subjects of taxation, does not entrench upon the legitimate authority of the Union, or violate any right recognized, or secured, by the Constitution of the United States, this court, as between the State and its citizen, can afford

him no relief against State taxation, however unjust, oppressive, or onerous.

Plainly, therefore, our only duty is to inquire whether the Constitution prohibits a State from taxing, in the hands of one of its resident citizens, a debt held by him upon a resident of another State, and evidenced by the bond of the debtor, secured by deed of trust or mortgage upon real estate situated in the State in which the debtor resides.

The question does not seem to us to be very difficult of solution. The creditor, it is conceded, is a permanent resident within the jurisdiction of the State imposing the tax. The debt is property in his hands constituting a portion of his wealth, from which he is under the highest obligation, in common with his fellow-citizens of the same State, to contribute for the support of the government whose protection he enjoys.

That debt, although a species of intangible property, may, for purposes of taxation, if not for all others, be regarded as situated at the domicile of the creditor. It is none the less property because its amount and maturity are set forth in a bond. That bond, wherever actually held or deposited, is only evidence of the debt, and if destroyed, the debt — the right to demand payment of the money loaned, with the stipulated interest — remains. Nor is the debt, for the purposes of taxation, affected by the fact that it is secured by mortgage upon real estate situated in Illinois. The mortgage is but a security for the debt, and, as held in *State Tax on Foreign-held Bonds*, *supra*, the right of the creditor “to proceed against the property mortgaged, upon a given contingency, to enforce by its sale the payment of his demand, . . . has no locality independent of the party in whom it resides. It may undoubtedly be taxed by the State when held by a resident therein,” &c. *Cooley on Taxation*, 15, 63, 134, 270. The debt, then, having its *situs* at the creditor’s residence, both he and it are, for the purposes of taxation, within the jurisdiction of the State. It is, consequently, for the State to determine, consistently with its own fundamental law, whether such property owned by one of its residents shall contribute, by way of taxation, to maintain its government. Its discretion in that regard cannot be supervised or controlled by any department of the Federal government, for the reason, too obvious to require argument in its support, that such taxation violates no provision of the Federal Constitution. Manifestly it does not, as is supposed by counsel, interfere in any true sense with the exercise by Congress of the power to regulate commerce among the several States. *Nathan v. Louisiana*, 8 How. 73; *Cooley on Taxation*, 62. Nor does it, as is further supposed, abridge the privileges or immunities of citizens of the United States, or deprive the citizen of life, liberty, or property without due process of law, or violate the constitutional guaranty that the citizens of each State shall be entitled to all privileges of citizens in the several States.

Whether the State of Connecticut shall measure the contribution

which persons resident within its jurisdiction shall make by way of taxes, in return for the protection it affords them, by the value of the credits, choses in action, bonds, or stocks which they may own (other than such as are exempted or protected from taxation under the Constitution and laws of the United States), is a matter which concerns only the people of that State, with which the Federal government cannot rightly interfere.

*Judgment affirmed.*¹

IN THE MATTER OF THE ESTATE OF SWIFT.

NEW YORK COURT OF APPEALS. 1893.

[137 N. Y. 77.]

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made June 3, 1892, which affirmed an order of the Surrogate's Court of the city and county of New York, which affirmed an order assessing the value of the property of James T. Swift, deceased, which affirmed an order assessing the value of the property of said decedent subject to taxation under the Collateral Inheritance Tax Act. The facts, so far as material, are stated in the opinion.

S. W. Rosendale, for appellants. *Nelson S. Spencer*, for respondents.

GRAY, J. . . . The Attorney-General has argued that this law, commonly called the collateral inheritance tax law, imposes not a property tax but a charge for the privilege of acquiring property, and, as I apprehend it, the point of his argument is that, as there is no absolute right to succeed to property, the State has a right to annex a condition to the permission to take by will, or by the intestate laws, in the form of

1 "There is also sometimes what seems to be a double taxation of the same property to two individuals; as where the purchaser of property on credit is taxed on its full value, while the seller is taxed to the same amount on the debt. (See *Savings & Loan Society v. Austin*, 46 Cal. 416). How this would operate may be readily perceived by supposing the extreme case that all the property in a town is sold on credit; in which case, if the property is taxed to the purchasers, and the debts to sellers, it is manifest that the town taxes twice as much wealth as lies within its borders.

"Now, whether there is injustice in the taxation in every instance in which it can be shown that an individual who has been directly taxed his due proportion is also compelled indirectly to contribute, is a question we have no occasion to discuss. It is sufficient for our purposes to show that the decisions are nearly, if not quite, unanimous in holding that taxation is not invalid because of any such unequal results. It cannot be too distinctly borne in mind that any possible system of tax legislation must inevitably produce unequal and unjust results in individual instances. . . . The legislature must judge of the general result, and when the law has apportioned the tax, individual hardships must be regarded as among the inconveniences which are incident to regular government." — COOLEY, *Taxation*, 2d ed. 220.

See *Phil. Sav. Fund v. Yard*, 9 Pa. 359; *Com. v. Lehigh, &c. Co.*, 29 Atl. Rep. 664 (Pa. July, 1894). As regards the question in hand, it seems to make no difference in a sale on credit, whether there be security or not. — ED.

is subject to its laws and to the tax but because the state has a superior right in ownership by force of it can interfere with the prop. upon its owner's death in

a tax, to be paid by the persons for whose benefit the remedial legislation has been enacted. That is, substantially, the way in which he puts the proposition, and if the premise be true that the tax imposed is upon the privilege to acquire, and, as he says in his brief, is like "a duty imposed, payable by the beneficiary," possibly enough, we should have to agree with him. We might think, in that view of the Act, that the situs of property in a foreign jurisdiction was not a controlling circumstance. But if we take up the provisions of the law by which the tax is imposed, and if we consider them as they are framed and the principle which then seems to underlie the peculiar system of taxation created, I do not think that his essential proposition finds adequate support. . . .

But I do not think it at all important to our decision here that we should hold it to be a tax upon property precisely. A precise definition of the nature of this tax is not essential, if it is susceptible of exact definition. Thus far, in this court, we have not thought it necessary, in the cases coming before us, to determine whether the object of taxation is the property which passes, or not; though, in some, expressions may be found which seem to regard the tax in that light. (*Matter of McL'herson*, 104 N. Y. 306; *Matter of Enston*, 113 Id. 174; *Matter of Sherwell*, 125 Id. 379; *Matter of Romaine*, 127 Id. 80, and *Matter of Stewart*, 131 Id. 274.) The idea of this succession tax, as we may conveniently term it, is more or less compound; the principal idea being the subjection of property, ownership of which has ceased by reason of the death of its owner, to a diminution, by the State reserving to itself a portion of its amount, if in money, or of its appraised value, if in other forms of property. The accompanying, or the correlative idea should necessarily be that the property, over which such dominion is thus exercised, shall be within the territorial limits of the State at its owner's death, and, therefore, subject to the operation and the regulation of its laws. The State, in exercising its power to subject realty, or tangible property, to the operation of a tax, must, by every rule, be limited to property within its territorial confines.

The question here does not relate to the power of the State to tax its residents with respect to the ownership of property situated elsewhere. That question is not involved. The question is whether the legislature of the State, in creating this system of taxation of inheritances, or testamentary gifts, has not fixed as the standard of right the property passing by will, or by the intestate laws.

What has the State done, in effect, by the enactment of this tax law? It reaches out and appropriates for its use a portion of the property at the moment of its owner's decease; allowing only the balance to pass in the way directed by testator, or permitted by its intestate law, and while, in so doing, it is exercising an inherent and sovereign right, it seems very clear to my mind that it affects only property which lies within it, and, consequently, is subject to its right of eminent domain. The theory of sovereignty, which invests the State with the right and

residents of the state dying at their domicile are not subject to taxation. Different in case of shares of stock. If the shares of stock were held in N. Y.

Dissenters held that bonds might be taxed.
at p. 26, end of case, the dissenter thought the state

the power to permit and to regulate the succession to property upon its owner's decease, rests upon the fact of an actual dominion over that property. In exercising such a power of taxation, as is here in question, the principle, obviously, is that all property in the State is tributary for such a purpose and the sovereign power takes a portion, or percentage, of the property, not because the legatee is subject to its laws and to the tax, but because the State has a superior right, or ownership, by force of which it can intercept the property, upon its owner's death, in its passage into an ownership regulated by the enabling legislation of the State.

The rules of taxation have become pretty well settled, and it is fundamental among them that there shall be jurisdiction over the subject taxed; or, as it has been sometimes expressed, the taxing power of the State is coextensive with its sovereignty. It has not the power to tax directly either lands or tangible personal property situated in another State or country. As to the latter description of property no fiction transmuting its *situs* to the domicile of the owner is available, when the question is one of taxation. . . .

The proposition which suggests itself from reasoning, as from authority, is that the basis of the power to tax is the fact of an actual dominion over the subject of taxation at the time the tax is to be imposed.

The effect of this special tax is to take from the property a portion, or a percentage of it, for the use of the State, and I think it quite immaterial whether the tax can be precisely classified with a taxation of property or not. It is not a tax upon persons. If it is called a tax upon the succession to the ownership of property; still it relates to and subjects the property itself and when that is without the jurisdiction of the State, inasmuch as the succession is not of property within the dominion of the State, succession to it cannot be said to occur by permission of the State. As to lands this is clearly the case, and rights in or power over them are derived from or through the laws of the foreign State or country. As to goods and chattels it is true; for their transmission abroad is subject to the permission of and regulated by the laws of the State or country where actually situated. Jurisdiction over them belongs to the courts of that State or country for all purposes of policy, or of administration in the interests of its citizens, or of those having enforceable rights, and their surrender, or transmission, is upon principles of comity.

When succession to the ownership of property is by the permission of the State, then the permission can relate only to property over which the State has dominion and as to which it grants the privilege or permission. . . .

We can arrive at no other conclusion, in my opinion, than that the tax provided for in this law is only enforceable as to property which, at the time of its owner's death, was within the territorial limits of this State. As a law imposing a special tax, it is to be strictly construed

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against the State and a case must be clearly made out for its application. We should incline against a construction which might lead to double taxation; a result possible and probable under a different view of this law. If the property in the foreign jurisdiction was in land, or in goods and chattels, when, upon the testator's death, a new title, or ownership, attached to it, the bringing into this State of its cash proceeds, subsequently, no matter by what authority of will, or of statute, did not subject it to the tax. . . .

My brethren are of the opinion that the tax imposed under the Act is a tax on the right of succession, under a will, or by devolution in case of intestacy; a view of the law which my consideration of the question precludes my assenting to.

They concur in my opinion so far as it relates to the imposition of a tax upon real estate situated out of this State, although owned by a decedent, residing here at the time of his decease; holding with me that taxation of such was not intended, and that the doctrine of equitable conversion is not applicable to subject it to taxation. But as to the personal property of a resident decedent, wheresoever situated, whether within or without the State, they are of the opinion that it is subject to the tax imposed by the Act.

The judgment below, therefore, should be so modified as to exclude from its operation the personal property in New Jersey and, as so modified, it should be affirmed, without costs to either party as against the other. MAYNARD, J., not sitting.¹

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ASH v. THE PEOPLE.

SUPREME COURT OF MICHIGAN. 1863.

[11 Mich. 347.]

ERROR to the Recorder's Court of Detroit.

G. V. N. Lothrop, for plaintiff in error. Wm. Gray, for the People.

MARTIN, CH. J. The Charter of the city of Detroit empowers the Common Council to erect and maintain market houses, establish markets and market places, &c., and to provide fully for the good government and regulation thereof; and to license and regulate butchers and the keepers of shops, stalls, booths, or stands at markets, or any other place in the city, for the sale of any kind of meats, fish, poultry, &c.; and to authorize the mayor to grant such license, &c., and to prescribe the sum of money to be paid therefor into the city treasury. The city has established a market, and an ordinance exists prohibiting persons from keeping a meat shop or stand outside such market without a license from the mayor, and upon terms of paying into the city treasury five

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¹ Compare Scholey v. Rew, 23 Wall. 331. — ED.

dollars, and executing a bond conditioned that they will faithfully observe the provisions of the ordinance.

Ash keeps a meat shop outside the market, without a license; and alleges and insists that he has a right to do so, upon the ground that the ordinance is unconstitutional: 1st, in requiring a license fee from persons selling meats outside the market, and 2d, in requiring a fee beyond the sum necessary to defray the expense of making and registering the license, and which it is claimed is in fact a tax.

The power to license and regulate the vending of meats and vegetables is not denied, nor its necessity questioned. The health of the city demands that it should exist. If the power to regulate exists, then the city has the power to prescribe the limits within which the trade or calling shall be carried on without license. If carried on elsewhere the city may require the license and bond, for protection and regulation; and may require such reasonable fee as will compensate either partially or fully for the additional expense of inspection and regulation thereby incurred. The market being under the immediate supervision of the city officers, no extraordinary expenses need be incurred, and if there were, the rent of the stalls is considered a compensation. An ordinance of this kind does not in fact operate unequally, and is not against common right or in restraint of trade.

Nor is this exaction of five dollars a tax. It is but a reasonable compensation which the city demands from those who will not sell in the public market, for the additional labor of officers, and expense thereby imposed. If it be conceded that the city may demand a sum sufficient to defray the expense of making out the license, it is difficult to conceive why it may not also demand enough to pay all the expense attending the supervision of the trade at the place licensed. As we regard the sum exacted as a reasonable fee for the indemnity of the city, and not as in any sense a tax, we do not deem it expedient to discuss the further question of the extent of the power of the city to exact license fees, or the limits of such power.

The judgment must be affirmed.

MANNING and CHRISTIANCY, JJ., concurred. CAMPBELL, J., gave a brief dissenting opinion.

*Judgment affirmed.*¹

¹ And so *Jacksonville v. Ledwith*, 26 Fla. 163 (1890), *Cooley*, Const. Lim. 6 ed. 242. Compare *Chaddock v. Day*, 75 Mich. 527; *Tugwell v. Eagle Pass. Ferry Co.*, 74 Texas, 480; *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365.

In *Bostick v. The State*, 47 Ark. 126 (1886), in a prosecution for keeping a tavern without a license. It was held that there was no right to tax tavern-keeping, under the clause in the Constitution of Arkansas of 1868, providing "that the General Assembly should tax all privileges, pursuits, and occupations that were of no real use to society; all others to be exempt,"—since the occupation is useful and necessary. "The true answer," said the court (SMITH, J.), . . . "doubtless is that it is not a tax at all, but a valid exercise of the police power of the State, and that the object aimed at is not the raising of revenue, but the regulation of the business."—ED.

#. Note Tax but the exercise of police power.

LICENSE TAX CASES.

SUPREME COURT OF THE UNITED STATES. 1866.

[5 Wall. 462.]

CONGRESS, by an internal revenue Act of 1864, subsequently amended, enacted, that no persons should be engaged in certain trades or businesses, including those of selling lottery tickets and retail dealing in liquors, until they should have obtained a "license" (see 13 Stat. at Large, 248, 249, 252, 472, 485; 14 Id. 113, 116, 137, 301) from the United States. . . .

In New York and New Jersey, selling lottery tickets, as in Massachusetts retailing liquors (except in special cases, not important to be noted), is, by statute, wholly forbidden. Such selling or dealing is treated as an offence against public morals; made subject to indictment, fine, and imprisonment; and in one or more of the States named, high vigilance is enjoined on all magistrates to discover and to bring the offenders to justice; and grand juries are to be specially charged to present them.

In this condition of statute law, national and State, seven cases were brought before this court. They all arose under the provisions of the internal revenue Acts relating to licenses for selling liquors and dealing in lotteries, and to special taxes on the latter business. 13 Stat. at Large, 252, 472, 485, and 14 Id. 116, 137, 301-2. . . . [Here follows a statement of five of the cases.]

The general question in these five cases was: Can the defendants be legally convicted upon the several indictments found against them for not having complied with the Acts of Congress by taking out and paying for the required licenses to carry on the business in which they were engaged, such business being wholly prohibited by the laws of the several States in which it was carried on? . . . [Here follows a statement of the other two cases.]

In these two cases, therefore, the general question was: Could the defendants be legally convicted upon an indictment for being engaged in a business on which a special tax is imposed by Acts of Congress, without having paid such a special tax, notwithstanding that such business was, and is, wholly prohibited by the laws of New York?

The different cases were argued here for the different defendants by different counsel, *Mr. W. M. Erarts* representing the defendants in the New York cases, *Mr. Sennott*, the defendant in the case from Massachusetts, and *Mr. Woodbury* (by brief), one of the defendants in the cases, each, like the other, from New Jersey.

Mr. Speed, A. G. (at the last term), *Mr. Stanbery*, A. G. (at this), with the former of whom was *Mr. Reed*, A. G., of Massachusetts, *contra*.

The CHIEF JUSTICE, having stated the case, delivered the opinion of the court. . . .

We come now to examine a more serious objection to the legislation of Congress in relation to the dealings in controversy. It was argued for the defendants in error that a license to carry on a particular business gives an authority to carry it on; that the dealings in controversy were parcel of the internal trade of the State in which the defendants resided; that the internal trade of a State is not subject, in any respect, to legislation by Congress, and can neither be licensed nor prohibited by its authority; that licenses for such trade, granted under Acts of Congress, must therefore be absolutely null and void; and, consequently, that penalties for carrying on such trade without such license could not be constitutionally imposed.

This series of propositions, and the conclusion in which it terminates, depends on the postulate that a license necessarily confers an authority to carry on the licensed business. But do the licenses required by the Acts of Congress for selling liquor and lottery tickets confer any authority whatever?

It is not doubted that where Congress possesses constitutional power to regulate trade or intercourse, it may regulate by means of licenses as well as in other modes; and, in case of such regulation, a license will give to the licensee authority to do whatever is authorized by its terms.

Thus, Congress having power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes, may, without doubt, provide for granting coasting licenses, licenses to pilots, licenses to trade with the Indians, and any other licenses necessary or proper for the exercise of that great and extensive power; and the same observation is applicable to every other power of Congress, to the exercise of which the granting of licenses may be incident. All such licenses confer authority, and give rights to the licensee.

But very different considerations apply to the internal commerce or domestic trade of the States. Over this commerce and trade Congress has no power of regulation nor any direct control. This power belongs exclusively to the States. No interference by Congress with the business of citizens transacted within a State is warranted by the Constitution, except such as is strictly incidental to the exercise of powers clearly granted to the legislature. The power to authorize a business within a State is plainly repugnant to the exclusive power of the State over the same subject. It is true that the power of Congress to tax is a very extensive power. It is given in the Constitution, with only one exception and only two qualifications. Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity. Thus limited, and thus only, it reaches every subject, and may be exercised at discretion. But it reaches only existing subjects. Congress cannot authorize a trade or business within a State in order to tax it.

If, therefore, the licenses under consideration must be regarded as giving authority to carry on the branches of business which they license, it might be difficult, if not impossible, to reconcile the granting of them with the Constitution.

But it is not necessary to regard these laws as giving such authority. So far as they relate to trade within State limits, they give none, and can give none. They simply express the purpose of the government not to interfere by penal proceedings with the trade nominally licensed, if the required taxes are paid. The power to tax is not questioned, nor the power to impose penalties for non-payment of taxes. The granting of a license, therefore, must be regarded as nothing more than a mere form of imposing a tax, and of implying nothing except that the licensee shall be subject to no penalties under national law, if he pays it.

This construction is warranted by the practice of the government from its organization. As early as 1794 retail dealers in wines or in foreign distilled liquors were required to obtain and pay for licenses, and renew them annually, and penalties were imposed for carrying on the business without compliance with the law. 1 Stat. at Large, 377. In 1802 these license-taxes and the other excise or internal taxes, which had been imposed under the exigencies of the time, being no longer needed, were abolished. 2 Stat. at Large, 148. In 1813 revenue from excise was again required, and laws were enacted for the licensing of retail dealers in foreign merchandise, as well as to retail dealers in wines and various descriptions of liquors. 3 Id. 72. These taxes also were abolished after the necessity for them had passed away, in 1817. Id. 401. No claim was ever made that the licenses thus required gave authority to exercise trade or carry on business within a State. They were regarded merely as a convenient mode of imposing taxes on several descriptions of business, and of ascertaining the parties from whom such taxes were to be collected.

With this course of legislation in view, we cannot say that there is anything contrary to the Constitution in these provisions of the recent or existing internal revenue acts relating to licenses.

Nor are we able to perceive the force of the other objection made in argument, that the dealings for which licenses are required being prohibited by the laws of the State, cannot be taxed by the national government. There would be great force in it if the licenses were regarded as giving authority, for then there would be a direct conflict between national and State legislation on a subject which the Constitution places under the exclusive control of the States.

But, as we have already said, these licenses give no authority. They are mere receipts for taxes. And this would be true had the internal revenue Act of 1864, like those of 1794 and 1813, been silent on this head. But it was not silent. It expressly provided, in section sixty-seven, that no license provided for in it should, if granted, be construed to authorize any business with any State or

Territory prohibited by the laws thereof, or so as to prevent the taxation of the same business by the State. This provision not only recognizes the full control by the States of business carried on within their limits, but extends the same principle, so far as such business licensed by the national government is concerned, to the Territories.

There is nothing hostile or contradictory, therefore, in the Acts of Congress to the legislation of the States. { What the latter prohibits, the former, if the business is found existing notwithstanding the prohibition, discourages by taxation. } The two lines of legislation proceed in the same direction, and tend to the same result. It would be a judicial anomaly, as singular as indefensible, if we should hold a violation of the laws of the State to be a justification for the violation of the laws of the Union.

These considerations require an affirmative answer to the first general question, Whether the several defendants, charged with carrying on business prohibited by State laws, without the licenses required by Acts of Congress, can be convicted and condemned to pay the penalties imposed by these Acts? . . .

ST. LOUIS v. WESTERN UNION TELEGRAPH COMPANY.

SUPREME COURT OF THE UNITED STATES. 1893.

[148 U. S. 92.¹]

[ERROR to the Circuit Court of the United States for the Eastern District of Missouri. The plaintiff sued for money alleged to be due from the defendants under a city ordinance, for maintaining telegraph poles in the plaintiff's streets. <The city ordinance required of the defendant to pay "for the privilege of using the streets . . . the sum of five dollars per annum for each . . . telegraph or telephone pole erected or used by them.>. . . The defendants, alleging other defences, denied the validity of this ordinance. The court below entered judgment for the defendants, holding that this was a privilege or license-tax which the city had no authority to impose.]

Mr. W. C. Marshall for plaintiff in error. *Mr. John F. Dillon* (with whom was *Mr. Rush Taggart* on the brief), and *Mr. Elenious Smith* (with whom were *Mr. Charles W. Wells*, *Mr. Willard Brown*, and *Mr. George H. Fearons* on the brief), for defendant in error.

MR. JUSTICE BREWER, after stating the case, delivered the opinion of the court. . . .

And, first, with reference to the ruling that this charge was a privilege or license tax. To determine this question, we must refer to the language of the ordinance itself, and by that we find that the charge

¹ The statement of facts is omitted. — ED.

is imposed for the privilege of using the streets, alleys, and public places, and is graduated by the amount of such use. Clearly, this is no privilege or license-tax. The amount to be paid is not graduated by the amount of the business, nor is it a sum fixed for the privilege of doing business. It is more in the nature of a charge for the use of property belonging to the city—that which may properly be called rental. “A tax is a demand of sovereignty; a toll is a demand of proprietorship.” *State Freight Tax Case*, 15 Wall. 232, 278. If, instead of occupying the streets and public places with its telegraph poles, the company should do what it may rightfully do, purchase ground in the various blocks from private individuals, and to such ground remove its poles, the section would no longer have any application to it. That by it the city receives something which it may use as revenue, does not determine the character of the charge or make it a tax. The revenues of a municipality may come from rentals as legitimately and as properly as from taxes. Supposing the city of St. Louis should find its city hall too small for its purposes, or too far removed from the centre of business, and should purchase or build another more satisfactory in this respect; it would not thereafter be forced to let the old remain vacant or to immediately sell it, but might derive revenue by renting its various rooms. Would an ordinance fixing the price at which those rooms could be occupied be in any sense one imposing a tax? Nor is the character of the charge changed by reason of the fact that it is not imposed upon such telegraph companies as by ordinance are taxed on their gross income for city purposes. In the illustration just made in respect to a city hall, suppose that the city, in its ordinance fixing a price for the use of rooms, should permit persons who pay a certain amount of taxes to occupy a portion of the building free of rent, that would not make the charge upon others for their use of rooms a tax. Whatever the reasons may have been for exempting certain classes of companies from this charge, such exemption does not change the character of the charge, or make that a tax which would otherwise be a matter of rental. Whether the city has power to collect rental for the use of streets and public places, or whether, if it has, the charge as here made is excessive, are questions entirely distinct. That this is not a tax upon the property of the corporation, or upon its business, or for the privilege of doing business, is thus disclosed by the very terms of the section. The city has attempted to make the telegraph company pay for appropriating to its own and sole use a part of the streets and public places of the city. It is seeking to collect rent. While we think that the Circuit Court erred in its conclusions as to the character of this charge, it does not follow therefrom that the judgment should be reversed, and a judgment entered in favor of the city. Other questions are presented which compel examination.

Has the city a right to charge this defendant for the use of its streets and public places? And here, first, it may be well to consider

the nature of the use which is made by the defendant of the streets, and the general power of the public to exact compensation for the use of streets and roads. The use which the defendant makes of the streets is an exclusive and permanent one, and not one temporary, shifting, and in common with the general public. The ordinary traveller, whether on foot or in a vehicle, passes to and fro along the streets, and his use and occupation thereof are temporary and shifting. The space he occupies one moment he abandons the next to be occupied by any other traveller. This use is common to all members of the public, and it is a use open equally to citizens of other States with those of the State in which the street is situate. But the use made by the telegraph company is, in respect to so much of the space as it occupies with its poles, permanent and exclusive. It as effectually and permanently dispossesses the general public as if it had destroyed that amount of ground. Whatever benefit the public may receive in the way of transportation of messages, that space is, so far as respects its actual use for purposes of a highway and personal travel, wholly lost to the public. By sufficient multiplication of telegraph and telephone companies the whole space of the highway might be occupied, and that which was designed for general use for purposes of travel entirely appropriated to the separate use of companies and for the transportation of messages.

We do not mean to be understood as questioning the right of municipalities to permit such occupation of the streets by telegraph and telephone companies, nor is there involved here the question whether such use is a new servitude or burden placed upon the easement, entitling the adjacent lot-owners to additional compensation. All that we desire or need to notice is the fact that this use is an absolute, permanent, and exclusive appropriation of that space in the streets which is occupied by the telegraph poles. To that extent it is a use different in kind and extent from that enjoyed by the general public. Now, when there is this permanent and exclusive appropriation of a part of the highway, is there in the nature of things anything to inhibit the public from exacting rental for the space thus occupied? Obviously not. Suppose a municipality permits one to occupy space in a public park, for the erection of a booth in which to sell fruit and other articles; who would question the right of the city to charge for the use of the ground thus occupied, or call such charge a tax, or anything else except rental? So, in like manner, while permission to a telegraph company to occupy the streets is not technically a lease, and does not in terms create the relation of landlord and tenant, yet it is the giving of the exclusive use of real estate, for which the giver has a right to exact compensation, which is in the nature of rental.

We do not understand it to be questioned by counsel for the defendant that, under the Constitution and laws of Missouri, the city of St. Louis has the full control of its streets, and in this respect represents the public in relation thereto.

It is claimed, however, by defendant, that under the Act of Congress of July 24, 1866, c. 230, 14 Stat. 221, and by virtue of its written acceptance of the provisions, restrictions, and obligations imposed by that Act, it has a right to occupy the streets of St. Louis with its telegraph poles. The first section of that Act contains the supposed grant of power. It reads: "That any telegraph company now organized, or which may hereafter be organized under the laws of any State in this Union, shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by Act of Congress, and over, under, or across the navigable streams or waters of the United States: Provided, That such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads." By sec. 3964, Rev. Stat. U. S.: "The following are established post roads: . . . All letter-carrier routes established in any city or town for the collection and delivery of mail matters." And the streets of St. Louis are such "letter-carrier routes." So also by the Act of March 1, 1884, 23 Stat. 3: "All public roads and highways, while kept up and maintained as such, are hereby declared to be post routes."

It is a misconception, however, to suppose that the franchise or privilege granted by the Act of 1866 carries with it the unrestricted right to appropriate the public property of a State. It is like any other franchise, to be exercised in subordination to public as to private rights. While a grant from one government may supersede and abridge franchises and rights held at the will of its grantor, it cannot abridge any property rights of a public character created by the authority of another sovereignty. No one would suppose that a franchise from the Federal government to a corporation, State or national, to construct interstate roads or lines of travel, transportation, or communication, would authorize it to enter upon the private property of an individual, and appropriate it without compensation. No matter how broad and comprehensive might be the terms in which the franchise was granted, it would be confessedly subordinate to the right of the individual not to be deprived of his property without just compensation. And the principle is the same when, under the grant of a franchise from the national government, a corporation assumes to enter upon property of a public nature belonging to a State. It would not be claimed, for instance, that under a franchise from Congress to construct and operate an interstate railroad the grantee thereof could enter upon the State-house grounds of the State, and construct its depot there, without paying the value of the property thus appropriated. Although the State-house grounds be property devoted to public uses, it is property devoted to the public uses of the State, and property whose ownership and control are in the State, and it is not

within the competency of the national government to dispossess the State of such control and use, or appropriate the same to its own benefit, or the benefit of any of its corporations or grantees, without suitable compensation to the State. This rule extends to streets and highways; they are the public property of the State. While for purposes of travel and common use they are open to the citizens of every State alike, and no State can by its legislation deprive the citizens of another State of such common use, yet when an appropriation of any part of this public property to an exclusive use is sought, whether by a citizen or corporation of the same or another State, or a corporation of the national government, it is within the competency of the State, representing the sovereignty of that local public, to exact for its benefit compensation for this exclusive appropriation. It matters not for what that exclusive appropriation is taken, whether for steam railroads or street railroads, telegraphs or telephones, the State may if it chooses exact from the party or corporation given such exclusive use pecuniary compensation to the general public for being deprived of the common use of the portion thus appropriated.

This is not the first time that an effort has been made to withdraw corporate property from State control, under and by virtue of this Act of Congress. In *Western Union Telegraph Company v. Massachusetts*, 125 U. S. 530, the telegraph company set up that Act as a defence against State taxation, but the defence was overruled. Mr. Justice Miller, on page 548, speaking for the court, used this language: "This, however, is merely a permissive statute, and there is no expression in it which implies that this permission to extend its lines along roads not built or owned by the United States, or over and under navigable streams, or over bridges not built or owned by the Federal government, carries with it any exemption from the ordinary burdens of taxation. While the State could not interfere by any specific statute to prevent a corporation from placing its lines along these post-roads, or stop the use of them after they were placed there, nevertheless the company receiving the benefit of the laws of the State for the protection of its property and its rights is liable to be taxed upon its real or personal property as any other person would be. It never could have been intended by the Congress of the United States in conferring upon a corporation of one State the authority to enter the territory of any other State and erect its poles and lines therein, to establish the proposition that such a company owed no obedience to the laws of the State into which it thus entered, and was under no obligation to pay its fair proportion of the taxes necessary to its support."

If it is, as there held, simply a permissive statute, and nothing in it which implies that the permission to extend its lines along roads not built or owned by the United States carries with it any exemption from the ordinary burdens of taxation, it may also be affirmed that it carries with it no exemption from the ordinary burdens which may

be cast upon those who would appropriate to their exclusive use any portion of the public highways. . . .

Another matter is discussed by counsel which calls for attention, and that is the proposition that the ordinance charging five dollars a pole per annum is unreasonable, unjust, and excessive. Among other cases cited in support of that proposition is *Philadelphia v. Western Union Telegraph Co.*, 40 Fed. Rep. 615, in which an ordinance similar in its terms was held unreasonable and void by the Circuit Court of the United States for the Eastern District of Pennsylvania. We think that question, like the last, may be passed for further investigation on the subsequent trial. *Prima facie*, an ordinance like that is reasonable. The court cannot assume that such a charge is excessive, and so excessive as to make the ordinance unreasonable and void: for, as applied in certain cases, a like charge for so much appropriation of the streets may be reasonable. If within a few blocks of Wall Street, New York, the telegraph company should place on the public streets fifteen hundred of its large telegraph poles, it would seem as though no court could declare that five dollars a pole was an excessive annual rental for the ground so exclusively appropriated; while, on the other hand, a charge for a like number of poles in a small village, where space is abundant and land of little value, would be manifestly unreasonable, and might be so excessive as to be void. Indeed, it may be observed, in the line of the thoughts heretofore expressed, that this charge is one in the nature of rental; that the occupation by this interstate commerce company of the streets cannot be denied by the city; that all that it can insist upon is, in this respect, reasonable compensation for the space in the streets thus exclusively appropriated; and it follows in the nature of things that it does not lie exclusively in its power to determine what is reasonable rental. The inquiry must be open in the courts, and it is an inquiry which must depend largely upon matters not apparent upon the face of the ordinance, but existing only in the actual state of affairs in the city.

We think that this is all that need be said in reference to the case as it now stands. For the reasons given, the judgment is

Reversed, and the case remanded for a new trial.

MR. JUSTICE BROWN, dissenting.

The tax in this case cannot be considered, and does not purport to be a tax upon the property of the defendant. The gross disparity of the tax to the value of such property is of itself sufficient evidence of this fact—the total valuation of all of defendant's property in the city of St. Louis in 1884, as fixed by the State board of equalization, being but \$17,064.63, while the tax of \$5 upon 1,509 poles amounted to \$7,545, or more than 44 per cent of the entire value of the property.

If it be treated as a tax upon the franchise, then it is clearly invalid within the numerous decisions of this court, which deny the right of a State or municipality to impose a burden upon telegraph and other companies engaged in interstate commerce for the exercise of their

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franchises. *Leloup v. Mobile*, 127 U. S. 640; *Robbins v. Shelby Taxing District*, 120 U. S. 489; *Moran v. New Orleans*, 112 U. S. 69; *Harmon v. City of Chicago*, 147 U. S. 396; *Western Union Telegraph Co. v. Alabama*, 132 U. S. 472; *Pacific Express Co. v. Seibert*, 142 U. S. 339.

If this tax be sustainable at all, it must be upon the theory adopted by the court that the municipality has the right to tax the company for the use of its streets. While I have no doubt of its right to impose a reasonable tax for such use, the tax must be such as to appear to have been laid *bona fide* for that purpose. It seems to me, however, that the imposition of a tax of \$5 upon every pole erected by the company throughout the entire municipality is so excessive as to indicate that it was imposed with a different object. In the city of St. Louis alone the tax amounts, as above stated, to \$7,545. A similar tax in the city of Philadelphia amounted to \$16,000, while the facts showed that, at the most, only \$3,500 per year was required to cover every expenditure the city was obliged to make upon this account. *Philadelphia v. W. U. Tel. Co.*, 40 Fed. Rep. 615. A like tax imposed by every city through which the defendant company carries its wires would result practically in the destruction of its business. While, as stated in the opinion of the court, \$5 per pole might not be excessive if laid upon poles in the most thickly settled business section of the city, the court will take judicial notice of the fact that all the territory within the boundaries of our cities is not densely populated, that such cities include large areas but thinly inhabited, and that a tax which might be quite reasonable if imposed upon a few poles would be grossly oppressive if imposed upon every pole within the city. In my opinion the tax in question is unreasonable and excessive upon its face, and should not be upheld. The fact that it was nominally imposed for the privilege of using the streets is not conclusive as to the actual intent of the legislative body. As was said by this court in the *Passenger Cases*, 7 How. 283, 458: "It is a just and well-settled doctrine established by this court, that a State cannot do that indirectly which she is forbidden by the Constitution to do directly. If she cannot levy a duty or tax from the master or owner of a vessel engaged in commerce graduated on the tonnage or admeasurement of the vessel, she cannot effect the same purpose by merely changing the ratio, and graduating it on the number of masts, or of mariners, the size and power of the steam-engine, or the number of passengers which she carries. We have to deal with things, and we cannot change them by changing their names."

The tax in question seems to me to indicate upon its face that it was not imposed *bona fide* for the privilege of using the streets, but was intended either as a tax upon the franchise of the company, or for the purpose of driving its wires beneath the ground. While the latter object may be a perfectly legitimate one, I consider it a misuse of the taxing power to seek to accomplish it in this way. I am, therefore, constrained to dissent from the opinion of the court.

THE PEOPLE EX REL. GRIFFIN v. THE MAYOR, &c., OF
BROOKLYN.

NEW YORK COURT OF APPEALS. 1851.

[4 N Y 419.]

UNDER the charter of the city of Brooklyn, the Common Council in the year 1848 caused Flushing Avenue, one of the streets of that city, to be graded and paved at an expense of \$20,390.25, which, according to a provision in the charter, was assessed upon the owners or occupants of the lands benefited by the improvement in proportion to the amount of such benefit. After the assessment had been confirmed by the Common Council, Griffin and others, the relators, caused the proceedings to be removed by *certiorari* into the Supreme Court, where the proceedings were reversed and the assessment annulled, on the ground that the statute authorizing such assessments was unconstitutional and void. The Mayor and Common Council appealed to this court. The case is stated in the opinion of the court.

S. Beardsley and *J. C. Spencer*, for appellants. *A. Crist* and *R. Mott*, for respondents.

RUGGLES, J. . . . For the purpose of determining the constitutional question raised on the argument of this case, the first inquiry will be whether the street assessment in question was a rightful exercise of the power of taxation. If that question be answered in the affirmative, the objections made in the court below to the validity of the assessment are inapplicable. They were founded on those clauses in the Constitution which declare that no person shall be deprived of his property without due process of law, and that private property shall not be taken for public use without just compensation. Neither of these prohibitions apply to taxation.

No land was taken from the relators, or other persons assessed for the making of Flushing Avenue. The question, therefore, whether compensation for land taken for such use, could be made in estimated benefits, does not arise.

If the assessment was a rightful exercise of the power of taxation, nothing has been exacted under the right of eminent domain, and no compensation need be made, except that which is supposed in all taxation to be derived by the tax-payer from the application of the money raised to the purpose for which the tax is laid. . . .

It is conceded that the grading and paving of Flushing Avenue was a public work, the expense of which might rightfully have been raised by general taxation upon all the taxable inhabitants of Brooklyn. The legislature thought proper to shift the burden of this taxation upon that part, or class of the taxable inhabitants exclusively, whose lands were benefited by the work, and to impose it on them in proportion to the benefit they respectively received therefrom.

constitutional and void. Court of Appeals reversed this decision holding the law proper. It was just that the relators receive the benefit of a particular

Local assessments like the one in question have always been recognized as just and

This change in the apportionment of the burden was obviously made for the purpose of avoiding the injustice of general taxation for a special local object, the benefit of which extended only to a portion of the inhabitants of the city. It professed to apportion the tax according to the maxim, that "he who receives the advantage ought to sustain the burden," and to exact from each of the parties assessed no more than his just share of the burden according to this equitable rule of apportionment. The assessment, therefore, was taxation, and not an attempt to exercise the right of eminent domain.

If there be any sound objection to the assessment as a tax, it must be an objection which applies to the principle on which the tax is apportioned; because the object for which the money was to be raised is, without dispute, one for which taxation by a different rule of apportionment would have been lawful.

It remains to be seen whether anything can be found in the Constitution; in legal adjudication; in the practice of the government, or in the nature of things, by which taxation upon this principle of apportionment can be judicially annulled. . . . [Here follow quotations from the opinions of Marshall, C. J., in *Providence Bank v. Billings*, 4 Peters, 514, and *M' Culloch v. Maryland*, 4 Wheat. 428.]

Assuming this, as we safely may, to be sound doctrine, it must be conceded that the power of taxation and of apportioning taxation, or of assigning to each individual his share of the burden, is vested exclusively in the legislature, unless this power is limited or restrained by some constitutional provision. The power of taxing and the power of apportioning taxation are identical and inseparable. Taxes cannot be laid without apportionment; and the power of apportionment is therefore unlimited, unless it be restrained as a part of the power of taxation.

There is not, and since the original organization of the State government there has not been, any such constitutional limitation or restraint. The people have never ordained that taxation must be limited or regulated by any or either of the rules laid down by the Supreme Court in the case of *The People v. The Mayor of Brooklyn*, 6 Barb. 209, or in the case now under consideration. They have not ordained that taxation shall be general, so as to embrace all persons or all taxable persons within the State, or within any district, or territorial division of the State; nor that it shall or shall not be numerically equal, as in the case of a capitation tax; nor that it must be in the ratio of the value of each man's land, or of his goods, or of both combined; nor that a tax "must be co-extensive with the district, or upon all the property in a district which has the character of and is known to the law as a local sovereignty." Nor have they ordained or forbidden that a tax shall be apportioned according to the benefit which each taxpayer is supposed to receive from the object on which the tax is expended. In all these particulars the power of taxation is unrestrained.

The application of any one of these rules or principles of apportion-

ment, to all cases, would be manifestly oppressive and unjust. Either may be rightfully and wisely applied to the particular exigency to which it is best adapted.

Taxation is sometimes regulated by one of these principles, and sometimes by another; and very often it has been apportioned without reference to locality or to the tax-payer's ability to contribute, or to any proportion between the burden and the benefit. The excise laws, and taxes on carriages and watches, are among the many examples of this description of taxation. Some taxes affect classes of inhabitants only. All duties on imported goods are taxes on the class of consumers. The tax on one imported article falls on a large class of consumers, while the tax on another affects comparatively a few individuals. The duty on one article consumed by one class of inhabitants is twenty per cent of its value; while on another, consumed by a different class, it is forty per cent. The duty on one foreign commodity is laid for the purpose of revenue mainly, without reference to the ability of its consumers to pay; as in the case of the duty on salt. The duty on another is laid for the purpose of encouraging domestic manufactures of the same article; thus compelling the consumer to pay a higher price to one man than he could otherwise have bought the article for, from another. These discriminations may be impolitic, and in some cases unjust; but if the power of taxation upon importations had not been transferred by the people of this State to the Federal government, there could have been no pretence for declaring them to be unconstitutional in State legislation.

A property tax for the general purposes of the government, either of the State at large or of a county, city, or other district, is regarded as a just and equitable tax. The reason is obvious. It apportions the burden according to the benefit more nearly than any other inflexible rule of general taxation. (A rich man derives more benefit from taxation, in the protection and improvement of his property, than a poor man, and ought therefore to pay more.) But the amount of each man's benefit in general taxation cannot be ascertained and estimated with any degree of certainty; and for that reason a property tax is adopted instead of an estimate of benefits. In local taxation, however, for special purposes, the local benefits may in many cases be seen, traced, and estimated to a reasonable certainty. At least this has been supposed and assumed to be true by the legislature, whose duty it is to prescribe the rules on which taxation is to be apportioned; and whose determination of this matter, being within the scope of its lawful power, is conclusive.

In the case of *The People v. Brooklyn*, before referred to, it was said that a tax to be valid must be apportioned "upon principles of just equality," and upon all the property in the same political district; and that this is a fundamental principle of free government, which, although not contained in the Constitution, limits and controls the power of the legislature. This is new and it seems to me to be dan-

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gerous doctrine. It clothes the judicial tribunals with the power of trying the validity of a tax by a test neither prescribed nor defined by the Constitution. If by this test we may condemn an assessment apportioned according to the relation between burden and benefit, we may with far better reason condemn a capitation tax on the ground that numerical equality is not just equality; or a general property tax, for a local object, because it compels one portion of the community to pay more than their just share for the benefit of another portion. All discriminations in the taxation of property, and all exemptions from taxation on grounds of public policy, would fall by the application of this test. If this doctrine prevails it places the power of the courts above that of the legislature in a matter affecting not only the vital interests, but the very existence of the government. It assumes that the apportionment of taxation is to be regulated by judicial and not by legislative discretion. It obstructs the exercise of powers which belong to, and are inherent in the legislative department, and restrains the action of that branch of the government in cases in which the Constitution has left it free to act.

The idea that a tax or assessment of this kind must be made to embrace all the property within the city or ward in which the improvement is made, seems to have originated in Kentucky from the opinion of an eminent judge of the Court of Appeals of that State, in the case of *Sutton's Heirs v. The City of Louisville*, 5 Dana, 28. But that opinion was founded mainly on a clause in the Constitution of that State, which is not to be found in ours; and in respect to this point, the opinion was afterwards modified by the same judge, and the principle in effect abandoned in the case of *The City of Lexington v. McQuillan's Heirs*, 9 Dana, 513. . . .

But there never was any just foundation for saying that local taxation must necessarily be limited by or co-extensive with any previously established district. It is wrong that a few should be taxed for the benefit of the whole; and it is equally wrong that the whole should be taxed for the benefit of a few. No one town ought to be taxed exclusively for the payment of county expenses; and no county should be taxed for the expenses incurred for the benefit of a single town. The same principle of justice requires that where taxation for any local object benefits only a portion of a city or town, that portion only should bear the burden. There being no constitutional prohibition, the legislature may create a district for that special purpose, or they may tax a class of lands or persons benefited, to be designated by the public agents appointed for that purpose, without reference to town, county, or district lines. General taxation for such local objects is manifestly unjust. It burdens those who are not benefited, and benefits those who are not burdened. This injustice has led to the substitution of street assessments in place of general taxation; and it seems impossible to deny that in the theory of their apportionment they are far more equitable than general taxation for the purpose they are designed for.

The same principle of apportionment has been applied to bridges and turnpike roads. The money paid for their construction and maintenance is reimbursed by means of tolls. Tolls are delegated taxation; and this taxation is charged and apportioned upon those only who derive a benefit from the original expenditure, and in proportion to that benefit. General taxation upon a town or county for the building of a bridge is valid and lawful, but obviously unjust; because it compels one to pay for the benefit of another. Tolls are more equitable, because they equalize the burden with the benefit.

But this theory of apportioning taxation is not confined in practice to street assessments and tolls on bridges and turnpike roads. The main revenues of the State, the canal tolls, are regulated upon the same principle; and so far as the objection to street assessments applies to the principle of selecting those only who are benefited, and laying the burden on them in proportion to their respective advantages, it applies with equal force to tolls on bridges and turnpikes, and on the public canals. The difference is only in the mode in which each tax-payer's share of the burden is ascertained.

It has been said that the benefits derived from the grading and paving of a street are sometimes fanciful and imaginary, and always uncertain and incapable of being estimated with that exactness which is necessary for the purposes of justice to the individuals assessed. But this is a consideration to be addressed to the legislature, and not to the judicial authorities. The courts cannot assume that this proposition is true in point of fact. The legislature has evidently acted on the belief that it is untrue. That mistakes may have happened, that abuses may have been practised, and that injustice may have been done, in making street assessments, it is not necessary to deny. Mistakes, abuses, and injustice have often occurred in general taxation. These are not grounds on which either system of supplying the public treasury can be denounced as unconstitutional. If the systems are imperfect, they should be reformed by the legislature. If street assessments are in their practical operation oppressive and unjust, the statutes which authorize them should be repealed. { The remedy for unjust or unwise legislation is not to be administered by the courts. } It remains in the hands of the people; and is to be wrought out by means of a change in the representative body, if it cannot be otherwise obtained. The Constitution has imposed upon the legislature the duty of restraining the power of municipal corporations in making assessments, and of preventing abuses therein. Art. 8, § 9. To assume that this duty has been and will be neglected is a denial of that reasonable confidence which one department of the government ought always to entertain towards the others. The danger of abuse which is supposed to exist in the making of street assessments, exists in a greater or less degree, in every conceivable system of taxation, according to value; and if the courts have authority to annul an assessment on this ground, they have the like authority to annul any other tax assessed upon valu-

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ation, on the same ground. It need not be said that this would be a much more alarming power than the unlimited right of taxation intrusted by the people to their representatives.

The constitutionality of the assessment in question, as a tax, has thus far been considered upon reason and principle, and without reference to judicial decisions on this subject. An examination of these authorities will show that they are in conformity with conclusions derived from reason and principle.

The difference between general taxation and special assessments for local objects requires that they should be distinguished by different names, although both derive their authority from the taxing power. They have always been so distinguished, and it is therefore evident that the word "tax" may be used in a contract, or in a statute, in a sense which would not include a street assessment, or any other local or special taxation within its meaning. Several cases are found in which it has been adjudged to have been so used. But in no case has it been adjudged that street assessments are not made by virtue of the legislative taxing power. If there are expressions to the contrary, in some of the cases, it will be found that they are *dicta* inapplicable to the point decided; or if applicable, that they were unnecessary to the decision, and not well considered. . . . [Here follows a statement of *Matter of Mayor of New York*, 11 Johns. 77; *Bleecker v. Ballou*, 3 Wend. 263; and *Sharp v. Spier*, 4 Hill, 76.]

It is true that Bronson, J., who delivered the opinion [in *Sharp v. Spier*] repeated the *dicta* found in the *Matter of the Mayor of New York*, 11 Johns. 77, that an assessment is not regarded as a burden, but as an equivalent for benefit, and therefore, cannot be regarded as a tax; but the decision rested clearly and safely on other grounds; although if it had stood on this alone it would have established nothing except that an assessment was not a tax within the meaning of the 7th section of the Act incorporating the village. The question whether street assessments are not made in virtue of the power of taxation, was not in that case decided. On the contrary, a question involving that point was expressly reserved as undecided, by Mr. Justice Bronson, who said, "I have not overlooked the fact that street assessments are, by the third section of this Act, made a lien or charge on the land. Whether that fact, taken in connection with the power conferred by the 7th section, will authorize a sale of land for street assessment, we are not now called upon to determine."

But the question now in controversy was involved and decided in the court for the correction of errors in the case of *The Mayor, &c. of New York v. Livingston*, 8 Wend. 85, 101. . . .

This case affords an example of the exercise of the two powers before mentioned, that is, the power of eminent domain and the power of taxation; the first in taking the land for the use of the street, and the second in requiring contribution to defray the expenses of improving it, from that class of persons on whom the burden ought to fall.

The case affirms the validity of street assessments, in virtue of the latter power. In 15 Wend. 376, *Owners of Ground Assessed v. Mayor, &c. of Albany*, the land of Mr. Betts, adjoining a square laid out in Albany, was assessed to pay the expenses, and Chief Justice Savage said: "It cannot be conceded that any constitutional question properly arises in relation to Mr. Betts. His property has not been taken for public use." And although he did not affirm or deny that the assessment was a tax, he affirmed the validity of the assessment against the objection of unconstitutionality expressly raised; and this could have been done on no other principle than that it was an exercise of the power of taxation. . . . [The court here consider *Thomas v. Leland*, 24 Wend. 65, and *Stryker v. Kelly*, 7 Hill, 9.]

The examination of the cases decided in this State terminates in the conclusion (although several of the cases contain dicta to the contrary) that street assessments like that in controversy in this suit, have been adjudged, both in the Supreme Court and in the court for the correction of errors, to be lawful and constitutional taxation.

One of the objections to the validity of the assessment and of the statute under which it was made, was that the assessment was not made by a jury or by commissioners, as required by section 7 of Article 1 of the Constitution. It is only necessary to say in reference to this objection, that the constitutional provision referred to applies only to private property taken for public use by right of eminent domain, and not to cases of taxation.

Taxation similar to that now in controversy has been sanctioned by long usage in this State and elsewhere.

In England, the commissioners of sewers assess the lands affected by their operations, without reference to other locality. 23 H. 8, ch. 5, § 3; 4 Evans' Stat. 26.

In Massachusetts, meadows, swamps, and lowlands may be assessed among the proprietors for the expense of draining the same, without reference to any political district, and in proportion to the benefit each proprietor derives from the work. R. S. of Mass. 673. In Connecticut, the same power is given by statute to commissioners for draining marshy lands. Stat. of Conn. ed. of 1839, p. 544.

In Pennsylvania, South Carolina, and Louisiana, taxation upon this principle has been practised and sanctioned as constitutional (9 Dana, 524); and in New Jersey, Maryland, Virginia, Ohio, and Indiana, it is understood that local taxation upon similar principles is authorized by law.

In the Colony and State of New York, the system of taxation for local purposes by assessing the burden according to the benefit, has been in force for more than one hundred and fifty years. It was applied to highways in the County of Ulster in 1691. Bradf. Laws, 45. The power was given to the corporation of New York in the same year. Id. 9. This statute remained in force in 1773, when Van Schaack's edition of the statutes was published, and no evidence of its

repeal is found until 1787, when it seems to have been revised, and its provisions re-enacted under the State Constitution. Van Schaack's L. 8, 9; 2 Jones & Var. 152; 1 Greenl. 443. The colonial statute was doubtless in force when the State Constitution was adopted. It is not unworthy of remark, that in April, 1691, a Bill of Rights was passed for the security and protection of the people of the Province. The statute authorizing the assessments first mentioned was passed afterwards during the same year. In January, 1787, an Act was passed declaring the rights of the citizens of this State, and prohibiting among other things that any person should be deprived of his property except by due course of law. The statute of 1787, authorizing street assessments in the city of New York, was passed by the same legislature, and sanctioned by the same council of revision, which had assented to the Bill of Rights. Street assessments upon the same principle were authorized in the city of New York in 1793, 3 Greenl. 58; and in 1795, Id. 244, 245; and in 1796, Id. 333, 334; and in 1801, 2 K. & R. 130; and in 1813, 2 R. L. 407. The corporation of New York have had and exercised authority to make street assessments from the infancy of that city. Similar powers have been conferred on nearly every city, and on many of the villages in this State. It has also been applied to highways, to turnpike roads, and to the draining of marshes.

This system of taxation was in force at the time of the making and adoption of our first, second, and third constitutions, and has stood in our statute books along with the constitutions from 1777 until now, without prohibition or restraint. Sales of real estate to large amounts have been made, and the lands so sold are now held on the faith of the validity of these assessment laws. Proceedings under them have been brought before the Supreme Court for review, continually during the last thirty years. They have been litigated often on the ground of irregularity, and sometimes upon constitutional objections. They have been confirmed in cases almost without number. If the uniform practice of the government, from its origin, can settle any question of this nature, the power of the legislature to exercise this kind of taxation would seem to be established by it.¹ Constitutional objections never

¹ In *Reeves v. Treasurer Wood County*, 8 Oh. St. 333, 343 (1858), the court (BRINKERHOFF, J.), after citing the passage of the opinion in the text which ends at this point, said: "The exercise of certain powers of government are often imperiously demanded by peculiar topographical and climatic conditions. In Holland, nearly the whole surface of which is lower than the sea at high tide, the regulation of dikes and drains becomes a necessary function of government. So does the matter of irrigation in Egypt, Peru, and some other countries. It is notorious that a large district in the northwest portion of this State, not less probably than one-sixth the whole, and possessing elements of unsurpassed fertility — while it is sufficiently elevated above Lake Erie on the one side, and the basin of the Ohio River on the other, and almost everywhere with sufficient inclination in some direction, readily to carry off its surplus waters, if there were channels for its conveyance — has yet such an unbroken surface, and is so destitute of ravines and natural channels, as to render the appellation of 'black swamp' appropriate and familiar, and the district proverbial — more so probably than it really deserves — for dampness, miasm, and disease. To this large district,

prevailed against it until 1846, when the case of *The People v. The Mayor, &c. of Brooklyn*, was decided.

It is true, however, that they were complained of as operating harshly and unjustly in many instances. The subject was frequently brought before the legislature, and was debated in the public press.

The attempt was made in the convention of 1846 to abolish this mode of taxation. A standing committee was appointed to consider and report on the organization and power of cities and incorporated villages, and especially on their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit. Convention Documents, Nos. 10 & 15. . . .

Both the propositions reported by the committee failed; and after an unsuccessful effort by the chairman for their adoption (Debates, Argus ed. 806, 980), he submitted the following substitute, which was adopted and incorporated into the present Constitution as the 9th section of the 8th Article thereof, to wit: "It shall be the duty of the legislature to provide for the organization of cities and incorporated villages, and

capable of transformation, and in fact now being rapidly transformed, into a region at once healthful and productive, drains are a necessity. They must often be several miles in extent, and laid out with reference to some general plan. It is easy to see that the execution of these works is beyond the power of isolated individual effort, and that the public authority must be invoked to prescribe the location and plan, and thus to overrule the conflicts of individual opinion and individual selfishness. It is certainly possible to execute these necessary works by means of assessments upon property in proportion to benefits received, and thus to secure results more equitable to individuals than could be obtained in any other way, or by any other system of taxation. Looking, therefore, to the urgent necessity for the exercise of this power, however cogent may be the considerations which address themselves to the legislature to induce that body carefully to guard against its abuse, I can see no cause to regret, and no argument against, its existence. We conclude, therefore, that the power of the General Assembly to authorize local assessments, in proportion to benefits conferred, for the construction of free turnpike roads, and for the drainage of lands, remains unbridged by any provision of the present Constitution.

"It is proper, however, that, before concluding this branch of the case, I should say, as a matter of justice to my brethren, that the considerations which I have thus presented, are more clear, convincing, and conclusive to my mind than they are to theirs; but all of them are of opinion that they are weighty enough to render the unconstitutionality of such assessments too doubtful to justify judicial interference with legislative discretion. If, therefore, the Act of May 1, 1854, and the Act amendatory thereto, presented no constitutional question other than that in relation to assessments, we should not feel ourselves at liberty to hold it to be unconstitutional."

In *City of Norfolk v. Chamberlain*, 89 Va. 196 (1892), in a very long and elaborate *obiter* discussion, RICHARDSON, J., denies the whole doctrine of local assessments. "The whole system and its every feature is opposed to equality and uniformity, is diametrically opposed to every principle of equitable apportionment, and so far from being legitimate taxation, is arbitrary exaction in its most odious form. After careful and laborious investigation, we are fully convinced that the doctrine held in the leading New York case of *The People v. The Mayor, &c. of Brooklyn*, and in numerous cases following it, cannot be sustained upon either reason or principle, and is opposed to the very letter, as well as the spirit of our own Constitution." Affirmed, *obiter* in *McCronell v. Bristol*, Id., 652, 673 (1893). See *Bloomington v. Latham et al.*, 142 Ill. 462 (1892). — Ed.

Parke'sburg v

25 D. C. R. 179 {Va}

to restrict their powers of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent abuses in assessments, and in contracting debt by such municipal corporations."

Instead of abolishing the system of assessments, this section of the Constitution refers it to the legislature for the correction of its abuses. The direction given to restrict the power of cities and villages to make assessments presupposes and admits the existence of a power to be restricted. The Constitution, therefore, in this section, recognizes and affirms the validity of the legislation by which city and village assessments for local purposes like that now in controversy are authorized; and seems to remove all doubt in relation to the legislative power in question. . . . The judgment of the Supreme Court should be reversed, and the assessment affirmed. *Ordered accordingly.*¹

¹ Compare the striking observations of CHURCH, C. J., for the court, in *Guest v. Brooklyn et al.*, 69 N. Y. 506 (1877), a case relating to local assessments. "The facts found by the referee indicate extravagance, irregularity, and to some extent abuses, and the proceedings culminating in an assessment of nearly \$5,000 upon the 'lot' of the plaintiff is significant of the great burden which must have been imposed upon property owners for the improvement in question, the whole expense aggregating about \$300,000. The case is not exceptional. Similar instances have been of frequent occurrence during the demoralized period of the last few years, and statutes have been easily procured to legalize whatever may have occurred.

"It may well be claimed that the whole system of assessments for local improvements, especially as authorized and practised in New York and Brooklyn, is unjust and oppressive, unsound in principle and vicious in practice. The right to make a public street or avenue is based upon a public necessity, and the public should pay for it. Such an improvement is in no sense for private use or benefit, and it is difficult to find more reason for assessing the accidental owner of property situate in its vicinity, the amount of a mere incidental advantage supposed to be derived from the improvement, than for compensating him for an incidental injury, and all right to such compensation has been uniformly denied. When land is taken for the improvement, there is some propriety, when determining the amount of compensation, in regarding the advantages to the owner arising from the manner of its proposed public use, because it may be said that, in some sense, it goes to the question of damages for the injury actually committed. So the harsh features of the obnoxious principle underlying the system are mitigated, if not avoided, when the consent of the owners, or even a majority of them, is required to authorize the construction of the improvement. But, to force an expensive improvement upon a few property owners, against their consent, and compel them to pay the entire expense, under the delusive pretence of a corresponding specific benefit conferred upon their property, is a species of despotism that ought not to be perpetuated under a government which claims to protect property equally with life and liberty. Besides its manifest injustice, it deprives the citizen practically of the principal protection (aside from constitutional restraints) afforded in a free country against unjust taxation; the responsibility of the representative for his acts to his constituents. Marshall, C. J., in *M'ulloch v. State of Maryland*, 4 Wheat. 428, said: 'The only security against the abuse of this power (the taxing power) is found in the structure of the government itself. In imposing a tax, the legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation.' This is true to a degree, as it respects general taxation, when all are equally affected, but it has no beneficial application in preventing local taxation for public improvements. The majority of the constituents would generally approve, certainly not dissent from taxing the small minority.

"The few are powerless against the legislative encroachments of the many. The 'constituents,' under this system, are attacked in detail, a few only selected at a time,

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DORGAN v. CITY OF BOSTON.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1866.

[12 Allen, 223.]

BILL in equity setting forth that the plaintiff is the owner of an estate situated on the corner of Belmont and Purchase streets, in Boston, with valuable buildings thereon; that the city of Boston, by its mayor and aldermen, have ordered Belmont Street to be laid out and widened to a width of not less than fifty feet, and so graded that the rise or fall shall in no place exceed two and one-half feet in one hundred; that for these purposes they have further ordered that a portion of the plaintiff's estate shall be taken and graded, containing in all about fourteen hundred and fifty-seven feet; that they have also ordered and resolved that said mayor and aldermen shall estimate the damages sustained by the plaintiff, including the value of the whole of the buildings, part of which are so taken, deducting therefrom the value of the materials to be removed and of the buildings which will remain standing, and that in estimating the value of the land cut off the same shall be estimated at its value before the widening, and such estimate shall not include the increased value occasioned merely by the widening, laying out and grading of the street, and that said mayor and aldermen shall assess the whole expense of the widening, including the damages for

and they have no power to enforce accountability, or to punish for a violation of duty on the part of the representative. The majority are never backward in consenting to, and even demanding, improvements which they may enjoy without expense to themselves. The inevitable consequence is, to induce improvements in advance of public necessity, to cause extravagant expenditures, fraudulent practices, and ruinous taxation. The system operates unequally and unjustly, and leads to oppression and confiscation. It is difficult to discover in it a single redeeming feature which ought to commend it to public favor. I make these observations to enable me to say more impressively, that the effective remedy is not with the judiciary. (Whatever our individual views may be of the policy, we are obliged to maintain established rules of law, and to restrain our own power within prescribed limits, as well as to enforce restrictions upon other departments of government. We should regard a departure by the courts from rules of law wisely established for the protection of all, to meet the equities of a particular case or class of cases, as a far greater evil than that sought to be remedied. Courts can confine the legislature within constitutional authority; and, when the questions are legitimately up, can and do exact a strict compliance with all the requirements of law leading to a forcible taking of the property of the citizen, but beyond this they have no discretion, and are themselves bound to observe and enforce legislative provisions, whether they approve them or not. The only effective remedy is with the legislative department of the government, and it may possibly have been before applied but for the existence of other more engrossing abuses affecting the whole people; but among the manifold evils complained of in municipal administration, there is no one, in my judgment, calling more loudly for reform than this arbitrary system of local assessments. The order must be affirmed, and judgment absolute for defendant.

"All concur. Order affirmed, and judgment accordingly."

Compare Mr. Victor Rosewater's valuable study of "Special Assessments" (New York, Columbia College, 1893). — Ed.

...less to him, but yet after, were assessing a large sum
from him. He insisted the act was unconstitutional.

land taken and the net expense of grading the whole widened street upon the estates abutting upon said street, in proportion to their value, as they shall be appraised by said mayor and aldermen when the widening and grading shall have been made.

The bill further set forth that the portion of the petitioner's estate remaining would be almost valueless to him; that nevertheless the defendants were proceeding to assess a large sum upon him, claiming that they were authorized to do so by St. 1865, c. 159; that said statute is unconstitutional and void; that the mayor and aldermen in assessing the damages for taking the plaintiff's estate proceeded according to the provisions of the above statute; and that their assessment is void. The prayer was for an injunction, and for other relief.

The answer admitted the plaintiff's title, and the taking of the portion of his estate alleged in the bill for the purposes and in the manner set forth, and alleged that the mayor and aldermen had duly awarded damages to him therefor, in the sum of \$6,304.88, and ordered that the cost of the laying out and grading of the street be hereafter assessed according to the provisions of St. 1865, c. 159; and further set forth that the plaintiff's estate would be greatly benefited by the proposed change, and that the statute referred to is constitutional, and all the proceedings of the mayor and aldermen were authorized thereby.

The plaintiff filed a general replication, and the case was reserved, by CHAPMAN, J., on the bill, answer and replication, for the determination of the whole court, with leave for either party, after the decision upon the constitutionality of St. 1865, c. 159, to move for a further hearing upon such matters as the court should think proper.

I. F. Redfield and J. G. Abbott (W. A. Herrick with them), for the plaintiff. J. P. Healy and C. M. Ellis, for the defendants.

BIGELOW, C. J. . . . It remains for us to consider that branch of the plaintiff's case which involves an inquiry into the validity of the assessment or mode of taxation prescribed by the statute, by means of which the expenses of the proposed improvement are to be defrayed. The broad position assumed by the plaintiff is, that this is a palpable violation of that provision of the Constitution, part 2, c. 1, § 1, art. 4, by which the power is given to the legislature to impose only proportional and reasonable taxes. We have already had occasion to consider the force and effect of these words, in connection with other portions of the same article in the Constitution, as applied to the imposition of taxes for the public charges of government. As to this class of taxation, the intent seems to be clear to put a restraint on the legislative authority, and to require that taxes levied for general purposes shall be laid on property, so that, taking all estates, real and personal, within the Commonwealth, as one of the elements of proportion, each person subject to taxation shall be obliged to pay only such portion of the taxes as the property owned by him bears to the whole sum to be raised. But this conclusion as to taxation for general purposes is drawn mainly from the clause in the Constitution which provides that, in order that assessments

A certain class of persons could not be arbitrarily selected for the imposition of a tax without regard

for such purposes may be made with equality, a valuation of estates shall be taken anew as often, at least, as once in ten years. This requirement seems to indicate very clearly that such taxation, in order to be proportional, shall be laid according to the property owned by each person liable to assessment within the Commonwealth. But this provision is in terms limited to the public charges of government; that is, to expenditures incurred for those objects of a public nature for which it is the duty of the government to provide, and the burden of which properly rests and is to be distributed among the whole people of the Commonwealth; such, for example, as the charges for carrying on the several departments of the government, for the support of a system of general education, and for the common protection and defence of the people and government of the State. These and other like expenditures, whether incurred by the immediate agents and officers of the State, or through the instrumentality of counties or towns, are to be defrayed by assessments laid with equality and in proportion to the property held by each person liable to taxation.

But there is another large class of expenditures for objects of a public nature for which it is the proper province of the government to provide, which cannot be deemed to come within the designation of public charges of government, or be held to be a proper subject of general assessment on the whole people of the Commonwealth. Take the case of money expended in effecting an improvement of a local character, which, although it may enure, to a certain extent, to the benefit of the public, is nevertheless especially necessary for and beneficial to private property in the immediate vicinity. It certainly would not be equitable or just, or tend to an equalization of public burdens, that the cost of such a work should be laid on the whole people, or upon those lying remote from the locality, having no property connected with the improvement, and who could derive but little or no benefit or advantage from its construction. The duty of the government to make provision to carry into effect works of such character is clear and unquestionable. Indeed, it is often indispensable for police or sanitary purposes, or the convenience and accommodation of persons living within a certain town or municipality, or a district or section thereof, that money should be expended for purposes of a public nature, but essentially local in their operation and effect. Nor can there be any doubt that ample power to procure the accomplishment of such objects is vested in the legislature, in the exercise of their authority to pass all manner of wholesome and reasonable laws for the good and welfare of the Commonwealth and the subjects thereof. This great and essential attribute of sovereignty would be greatly abridged, if it should be held that the legislature are restricted in their authority to provide means by the levying of taxes for those objects only which would form a proper subject of a general charge on the whole people of the Commonwealth, and have no power to authorize assessments for objects of a local character, the execution of which is required by the convenience and necessities of a town or

well as the improvement of grading.

Mass. 461 - The general betterment law was em-
tied to the betterment law.

the mass. court here: that the tax should be apportioned. Two classes of taxes under const

district or neighborhood. We see no reason for construing the provision in the Constitution giving to the legislature the power of imposing proportional and reasonable assessments, rates, and taxes, as an inhibition on the levy of a tax for local purposes of a public nature upon those who will reap the benefit on their estates of a proposed expenditure of money. Such is not the natural or reasonable interpretation of the clause, standing as it does in relation to this class or species of taxation, without other words to qualify or restrict its meaning. As has been already said, it is in regard to the public charges of government that the mode of raising money by the imposition of taxes is specially pointed out, and it is as to these only that a restriction is found on the meaning of the preceding clause, by which the power to levy proportional and reasonable taxes is given. As to all other assessments which may be required by the enactment and execution of wholesome and reasonable laws, no limitation of authority is expressed, and none can be implied except that which arises from the natural and proper import of the words used. It certainly cannot be said that all taxes laid for local purposes of a public nature on those who would be chiefly and directly benefited by the execution of a proposed work, and in proportion to the degree of benefit or profit which each will receive therefrom, are necessarily either unreasonable or unproportional. Nor can it be contended that the Constitution, in regard to this species of taxation, furnishes any fixed rules of proportion, or gives any absolute standard by which to determine whether a particular tax is within the limits of the legitimate exercise of the power granted. Undoubtedly a very wide discretion was intended to be left to the legislature as to the subjects and method of executing the authority conferred on them of imposing taxes for purposes other than those of a general nature; and yet the power is not wholly without limit. In requiring that taxes should be proportional and reasonable, the framers of the Constitution intended to erect a barrier against an arbitrary, unjust, unequal or oppressive exercise of the power. *Oliver v. Washington Mills*, 11 Allen, 268. If, for instance, the legislature should arbitrarily designate a certain class of persons on whom to impose a tax, either for general purposes or for a local object of a public nature, without any reference to any rule of proportion whatever, having no regard to the share of public charges which each ought to pay relatively to that borne by all others, or to any supposed peculiar benefit or profit which would accrue to those made subject to the tax which would not enure to others, so that in effect the burden would fall on those who had been selected only for the reason that they might be made subject to the tax, we cannot doubt that the imposition of it would be an unlawful exercise of power not warranted by the Constitution, against the exercise of which a person aggrieved might sue for protection. But no such case is made by the present bill. This part of the plaintiff's case rests on the broad proposition that the legislature have no power to authorize the assessment of the cost of a work of a public nature, but

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the construction of which will be of special and peculiar benefit to adjacent property, on the abutting estates in proportion to their value. For the reasons already given, we are of opinion that such a tax is neither unreasonable nor unproportional, and that it was competent for the legislature to impose it in the mode prescribed by the statute.

We are greatly strengthened in this conclusion by the consideration that such a mode of assessment of taxes for similar objects has been adopted and carried into effect without doubt or question in this Commonwealth, both under the colonial government and since the adoption of the Constitution. As early as 1658 it was ordered by the General Court of the colony that a certain way should be laid out through Roxbury to "Boston Farms," and power was given to impose the cost on "all such of Boston or other towns as shall have benefit of such way." 4 Mass. Col. Rec. pt. 1, 327. The Prov. St. 4 Wm. & Mary, c. 1 (Mass. Perp. Laws, 1), which provided for the laying out of streets in the city of Boston, and also for regulating and enlarging narrow and crooked lanes and passages therein, enacted that the damages for land taken for such enlargement and regulation should be assessed by a jury and paid "by the neighborhood or town" "in proportion to the benefit or conveniency any shall have thereby." A similar enactment was contained in Prov. St. 33 Geo. II. c. 3 (Mass. Perp. Laws, 387), which was an Act for rebuilding that part of Boston which had been laid waste by fire. It was thereby provided that a jury should view the streets laid out and the several tenements or lots of land abutting thereon, and should estimate the damages which any person might sustain by such laying out, and "likewise the benefit or advantage that may accrue to any person or persons thereby," which damages "shall be made good to the party endamaged either by such particular person or persons as shall be thereby benefited, or by the town of Boston, or by both, in such proportion as the said jury shall find reasonable." By Prov. St. 8 Anne, c. 99. and Prov. St. 3 Geo. III. c. 293 (Anc. Chart. 389, 651), persons receiving any benefit from common sewers, either direct or remote, were obliged to pay such a proportional part of making and repairing the same as should be assessed to them by the selectmen of the towns. Similar enactments were made by St. 1796, c. 47; Rev. Sts. c. 27; St. 1841, c. 115; and Gen. Sts. c. 48. By Prov. Sts. 12 Anne, c. 110, and 10 Geo. II. c. 194, § 1 (Anc. Chart. 403, 505), it was provided that damages caused by the laying out of particular and private ways necessary for towns and for the general benefit, should be paid by the towns, otherwise by such of the inhabitants as should have the benefit of the way, to be assessed by the justices of the Court of Sessions. So by the fifth section of the last-named statute it was provided that certain bridges should be repaired and maintained in whole or in part by those "who live near and reap the principal advantage" therefrom. By statute passed October 30, 1781, St. 1781, c. 14 (1 Mass. Special Laws, 21), entitled "an Act for widening and amending the streets, &c., of Charlestown" in that part which was laid waste by fire by the British

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troops, it was enacted that the selectmen should call on persons whose estates were benefited by the proposed improvement to join in the appointment of appraisers to determine the sum that the owner of an estate so benefited ought to pay, and the estate of such owner was made subject to pay the sum awarded against him. This Act is in this particular and in many others of its provisions very similar to the one under which the defendants have acted in taking land of the plaintiff; and it is especially noticeable because it was passed within a year from the time when the Constitution of Massachusetts was adopted, and by a legislature composed of many persons who had taken part, some of them a leading one, in the formation of that instrument. In a question touching the powers of the government under the Constitution, such contemporaneous action of the legislature is entitled to great weight in determining the true construction to be given to a particular clause. The principle of assessing the cost of a local improvement on those whose estates are benefited thereby was also embodied substantially in St. 1795, c. 62, which made provision for the draining of meadows and swamps, re-enacted in Rev. Sts. c. 115, and in Gen. Sts. c. 148; and likewise in St. 1855, c. 104, which authorized the construction of roads to low lands, mines and quarries, and the assessment of the cost on all parties according to the benefits received by each. So the numerous statutes passed by the legislature imposing the construction and maintenance of certain bridges on towns in the immediate vicinity, whose inhabitants derive the greatest benefit therefrom, are based on the same principle. Without extending citations further, it is apparent that the statute in question cannot be regarded as an innovation. On the contrary, it seems to be entirely in accordance with the established course of legislation from the foundation of the government to the present time.

Although no case has arisen heretofore in this court which presents the precise questions raised in the present case as to the power of the legislature to authorize a tax to be assessed on estates in the mode provided by the statute under consideration, the principle on which the assessment is based has been repeatedly recognized and sanctioned by this court. The result of these decisions, and the conclusion to which our own minds have been brought on this part of the case, may be stated to be, that taxes levied for public purposes of a local character are not unconstitutional, as being unreasonable and unproportional, solely because they are imposed only on a certain town or district, or on persons residing or owning property in a particular locality, and that an assessment made on persons in respect of their ownership of certain property which receives a peculiar benefit from the expenditure of the money raised by a tax, or by reason of their residence in the vicinity of a proposed public improvement, and the special advantage or convenience which will accrue to them and their property therefrom, will not be held invalid, although it does not operate on all persons and property in the community in the same manner as taxes levied for general

purposes. *Norwich v. County Commissioners*, 13 Pick. 60; *Goddard, petitioner*, 16 Pick. 504; *Attorney-General v. Cambridge*, 16 Gray, 247; *Morse v. Stocker*, 1 Allen, 150, 159; *Hingham & Quincy Turnpike Co. v. County of Norfolk*, 6 Allen, 353, 359. . . .

Upon these grounds we are of opinion that the plaintiff shows no claim to equitable relief, and that the order must be

*Bill dismissed.*¹

IN *The Tide-Water Company v. Coster*, 18 N. J. Eq. 518, 526 (1866), a statute providing for the draining of certain tide-water marshes and for assessing the cost proportionately upon the lands benefited, was held invalid for not limiting the assessment so as not to exceed the benefits of the improvement. BEASLEY, CHIEF JUSTICE, for

¹ Compare *Beaumont v. Wilkes Barre*, 142 Pa. 198 (1891). In *Hagar v. Reclamation District*, 111 U. S. 701, 704 (1884), on appeal from the United States Circuit Court for California, the court (FIELD, J.) said: "There being no Federal question touching these matters, we follow the decision of the State tribunals as to the construction and validity of the statutes. It is not open to doubt that it is in the power of the State to require local improvements to be made which are essential to the health and prosperity of any community within its borders. To this end it may provide for the construction of canals for draining marshy and malarious districts, and of levees to prevent inundations, as well as for the opening of streets in cities and of roads in the country. The system adopted in California to reclaim swamp and overflowed lands by forming districts, where the lands are susceptible of reclamation in one mode, is not essentially different from that of other States where lands of that description are found. The fact that the lands may be situated in more than one county cannot affect the power of the State to delegate authority for the establishment of a reclamation district to the supervisors of the county containing the greater part of the lands. Such authority may be lodged in any board or tribunal which the legislature may designate.

"In some States the reclamation is made by building levees on the banks of streams which are subject to overflow; in other States by ditches to carry off the surplus water. Levees or embankments are necessary to protect lands on the lower Mississippi against annual inundations. The expense of such works may be charged against parties specially benefited, and be made a lien upon their property. All that is required in such cases is that the charges shall be apportioned in some just and reasonable mode, according to the benefit received. Absolute equality in imposing them may not be reached; only an approximation to it may be attainable. If no direct and invidious discrimination in favor of certain persons to the prejudice of others be made, it is not a valid objection to the mode pursued that, to some extent, inequalities may arise. It may possibly be that in some portions of the country there are overflowed lands of so large an extent that the expense of their reclamation should properly be borne by the State. But this is a matter purely of legislative discretion. Whenever a local improvement is authorized, it is for the legislature to prescribe the way in which the means to meet its cost shall be raised, whether by general taxation, or by laying the burden upon the district specially benefited by the expenditure. *County of Mobile v. Kimball*, 102 U. S. 691, 704. The rule of equality and uniformity, prescribed in cases of taxation for State and county purposes, does not require that all property, or all persons in a county or district, shall be taxed for local purposes. Such an application of the rule would often produce the very inequality it was designed to prevent. As we said in *Louisiana v. Pillsbury*, 105 U. S. 278, 295, there would often be manifest injustice in subjecting the whole property of a city, and the same may be said of the whole property of any district, to taxation for an improvement of a local character. The rule, that he who reaps the benefit should bear the burden, must in such cases be applied." Compare *Lent v. Tillson*, 140 U. S. 316, s. c. *supra*, p. 654. — Ed.

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the Court of Errors and Appeals, said: "But looking more closely into the structure and effect of this statute, there appears to be a defect which seems to be both radical and incurable, and which must prevent its judicial enforcement. The defect alluded to is this: no provision is made for the indemnification of the owner of the land subjected to the operation of this law, in case the expense of the improvement shall exceed the benefits which shall be conferred. The Act authorizes the entire expense of drainage to be imposed upon the lands, whether such expense falls below, or rises above, the increase in value which may accrue to the lands by reason of such drainage. In other words, the cost of the enterprise is to be imposed as a burden on the lands, even though a full equivalent in the way of improvement shall not be given to the land-owner. Thus, if the cost of drainage should be \$5 an acre, such sum is to be assessed on the land, although such land may not be benefited more than to the extent of \$3 an acre. The statute does not require that the apportionment of expense shall be limited, as the maximum rate, by the increase in the value to result from the improved condition of the land. Now, therefore, it seems to me obvious, that if this scheme be carried into effect, in the event of an excess of expenses over benefits, private property, *pro tanto*, will be taken for public use without compensation. Where lands are improved by legislative action, on the ground of public utility, the cost of such improvement, it has been frequently held, may, to a certain degree, be imposed on the parties who, in consequence of owning lands in the vicinity of such improvement, receive a peculiar advantage. By the operation of such a system, it is not considered that the property of the individual, or any part of it, is taken from him for the public use, because he is compensated in the enhanced value of such property. But it is clear this principle is only applicable when the benefit is commensurate to the burden; when that which is received by the land-owner is equal or superior in value to the sum exacted; for if the sum exacted be in excess, then to that extent, most incontestably, private property is assumed by the public. Nor, as to this excess, can it be successfully maintained that such imposition is legitimate as an exercise of the power of taxation. Such an imposition has none of the essential characteristics of a tax. We are to bear in mind that this projected improvement is to be regarded as one in which the public has an interest; the owners of these waste lands have a special concern in such improvement, so far as their lands will be in a peculiar manner benefited; beyond this, their situation is the same as that of the rest of the community. The consideration for the excess of the cost of the improvement over the enhancement of the property, within the operation of this Act, is the public benefit: how, then, upon any principle of taxation, can this portion of the expense be thrown exclusively upon certain individuals? The expenditure of this portion of the cost of the work can only be justified on the ground of benefit to the public. I am aware of no principle which will permit the expenses incurred in conferring such

compensation. This is not taxation but condemnation of property. And the fact that in this case the less expense of improvement

benefit upon the public, to be laid in the form of a tax upon certain persons, who are designated, not indeed by name, but by their description as the owners of certain lands. A legislative Act authorizing the building of a public bridge, and directing the expenses to be assessed on A, B, and C, such persons not being in any way peculiarly benefited by such structure, would not be an act of taxation, but a condemnation of so much of the money of the persons designated, to a public use. And, precisely in the same way, would an exaction of the cost of these works embraced in the Act before us, so far as such cost exceeded the benefit to the lands improved, be an assumption of the money of a few individuals for an end purely public. Nor should it be overlooked, that if the scheme embraced in this Act should be put in operation, and the expenses should exceed or equal the value of the land in its reclaimed condition, the inevitable result would be, that the public would acquire the benefits contemplated by the rescue of the land from its present idleness, but the owner of the land would lose his entire property. Every consideration of equity stands opposed to the admission of such a rule of taxation. Nor do I consider it any answer to this last objection to suggest that there is no probability that the expenses of this improvement will equal the improved value of the land to be affected by it. It is clear, that the cost of the work and the value of the land in its altered condition, are not easy of estimation; it is certain, many enterprises of a similar character have proved abortive, and have brought great losses upon their projectors; and it is enough, therefore, to say, that the property owner cannot, without his consent, be made a party in the hazards of such an enterprise. If the assessment to which he is subjected had been restricted so as not to exceed the benefits received by him, he would have run no risk, because he could not have suffered any loss; but as this law is framed, his land may be taken from him, if the expenses of the project require the sacrifice. This, as has been already stated, would be, in my opinion, equivalent to a condemnation of the land, without compensation, for the public benefit, and as this may result from the natural operation of the statute, I am compelled to conclude that it is unconstitutional and void."

In *The State et al. v. Mayor of Newark et al.*, 37 N. J. Law, 415 (1874), BEASLEY, C. J., for the court, said: "The writ in this case has brought before the court the proceedings in the assessment of the expenses incurred in re-paving the road-bed of a portion of one of the public streets in the city of Newark. The cost of this work has been imposed in accordance with the direction of the legislative Act authorizing these improvements, in the proportion of two-thirds of such cost on the owners of the lots fronting on the line of the section of the street thus re-paved, and the remaining third on the city treasury.

"It thus appears that the statute in question undertakes to fix, at the proportion of $\frac{2}{3}$ on the property abutting on the street, and the remaining third on the prop. at large, is unconstitutional assessments for local improvements of this character.

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mere will of the legislature, the ratio of expense to be put upon the owner of the property along the line of the improvement; and the question is, whether such an Act is valid. The inquiry thus involved has, of late, been so exhaustively discussed in a crowd of judicial decisions, that I do not feel inclined to do more than so far to refer to general principles as may be necessary to explain clearly what I conceive to have been heretofore decided by this court.

"The doctrine that it is competent for the legislature to direct the expense of opening, paving, or improving a public street, or at least some part of such expense, to be put as a special burden on the property in the neighborhood of such improvement, cannot, at this day, be drawn in question. There is nothing in the Constitution of this State that requires that all the property in the State, or in any particular subdivision of the State, must be embraced in the operation of every law levying a tax. That the effect of such laws may not extend beyond certain prescribed limits, is perfectly indisputable. It is upon this principle that taxes raised in counties, townships, and cities, are vindicated. But while it is thus clear that the burden of a particular tax may be placed exclusively on any political district to whose benefit such tax is to enure, it seems to me it is equally clear that, when such burden is sought to be imposed on particular lands, not in themselves constituting a political subdivision of the State, we at once approach the line which is the boundary between acts of taxation and acts of confiscation. I think it impossible to assert, with the least show of reason, that the legislative right to select the subject of taxation is not a limited right. For it would seem much more in accordance with correct theory to maintain, that the power of selection of the property to be taxed cannot be contracted to narrower bounds than the political district within which it is to operate, than that such power is entirely illimitable. If such prerogative has no trammel or circumscription, then it follows that the entire burden of one of these public improvements can be placed, by the force of the legislative will, on the property of a few enumerated citizens, or even on that of a single citizen. In a government in which the legislative power is not omnipotent, and in which it is a fundamental axiom that private property cannot be taken without just compensation, the existence of an unlimited right in the law-making power to concentrate the burden of a tax upon specified property, does not exist. (If a statute should direct a certain street in a city to be paved, and the expense of such paving to be assessed on the houses standing at the four corners of such street, this would not be an act of taxation, and it is presumed that no one would assert it to be such.) If this cannot be maintained, then it follows that it is conceded that the legislative power in question is not completely arbitrary. It has its limit; and the only inquiry is, where that limit is to be placed.

"This question was considered, and, as it was supposed, was definitely settled by this court in the case of The Tide Water Company v.

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Coster, reported in 3 C. E. Green, 519. The principle sanctioned by that decision was, that the cost of a public improvement might be imposed on particularized property, to the extent to which such property was exceptionally benefited; and that any special burden beyond that measure was illegal. It was upon this principle that the case was rested. The rule thus adopted stands upon the idea that it establishes a standard by which, with at least an approach to precision, an act of taxation may be distinguished from an act of confiscation. So far as the particularized property is specifically benefited, an exaction to that extent will not be a condemnation of property to the public use, because an equivalent is returned; and this is the ground on which the abnormal burden put upon the land-owner is justified. Speaking on this subject, Chief Justice Green says: 'The theory upon which such assessments are sustained as a legitimate exercise of the taxing powers is, that the party assessed is locally and peculiarly benefited over and above the ordinary benefit which, as one of the community, he receives in all public improvements, to the precise extent of the assessment.' *State v. City of Newark*, 3 Dutcher, 190. It follows, then, that these local assessments are justifiable, on the ground above, that the locality is especially to be benefited by the outlay of the money to be raised. Unless this is the case, no reason can be assigned why the tax is not general. (An assessment laid on property along a city street for an improvement made in another street, in a distant part of the same city, would be universally condemned, both on moral and legal grounds.) And yet there is no difference between such an extortion and the requisition upon a land-owner to pay for a public improvement over and above the exceptive benefit received by him. It is true that the power of taxing is one of the high and indispensable prerogatives of the government, and it can be only in cases free from all doubt that its exercise can be declared by the courts to be illegal. But such a case, if it can ever arise, is certainly presented when property is specified, out of which a public improvement is to be paid for in excess of the value specially imparted to it by such improvement. As to such excess, I cannot distinguish an Act exacting its payment from the exercise of the power of eminent domain. In case of taxation the citizen pays his quota of the common burden: when his land is sequestered for the public use, he contributes more than such quota, and this is the distinction between the effect of the exercise of the taxing power and that of eminent domain. When, then, the overplus beyond benefits from these local improvements, is laid upon a few land-owners, such citizens, with respect to such overplus, are required to defray more than their share of the public outlay, and the coercive Act is not within the proper scope of the power to tax. And as it does not seem practicable to define the area upon which a tax can be legitimately laid, and beyond which it cannot be legitimately extended, and as there is, as has been shown, necessarily a limit to the power of selection in such instances, the principle stated in the case cited is, perhaps,

the only one that can be devised whereby to graduate the power. Consequently, when the improvement, as in the present instance, is primarily for the public welfare, and is only incidentally for the benefit of the land-owner, the rule thus established ought to be rigidly applied and adhered to.

“With the doctrine thus expounded, the case of *The State, Sigler, pros. v. Fuller*, 5 Vroom, 227, is not in harmony. This was an assessment for the improvement of a sidewalk, and in that feature differed from the present one, which is for the improvement of the road-bed. I think the difference is a substantial one. A sidewalk has, always in the laws and usages of this State, been regarded as an appendage to, and a part of, the premises to which it is attached, and is so essential to the beneficial use of such premises, that its improvement may well be regarded as a burden belonging to the ownership of the land, and the order or requisition for such an improvement as a police regulation. On this ground I conceive it to be quite legitimate to direct it to be put in order at the sole expense of the owner of the property to which it is subservient and indispensable. But in the reported case there was another circumstance which illegalized the proceedings. A part of the expense of constructing the sidewalk on one side of the street was thrown on the owners of the other side of the same street. The portion of the burden thus transferred was one-sixth of the expense, and it was directed to that extent to be imposed irrespective of the amount of any ascertained benefit conferred. This brought the case within the prohibition inherent in the rule laid down in the *Tide-Water* case, so that the proceedings should have been set aside. The suggestion that in this class of cases it will be presumed that the benefits equal the burden imposed until the contrary is shown, cannot prevail. If well founded, it would have led to a different result in the *Tide-Water* case. The only safe rule is that the statute authorizing the assessment shall itself fix, either in terms or by fair implication, the legal standard to which such assessment must be made to conform. In no other way can property be adequately protected.”¹

¹ Compare *White v. People*, 94 Ill 604; *Ill. Cent. R. R. Co. v. Decatur*, 147 U. S. 190, 207 (1893), s. c. *infra*, p. 1310; *Spencer v. Merchant*, 125 U. S. p. 345 (1887).

In *State v. Mayor, &c. of Paterson*, 42 N. J. Law, 615, 617 (1880), the Court of Errors and Appeals (BEASLEY, C. J.), said: “The only objection of any account urged against this statute is, that it confines the assessment for damages and benefits to lands fronting on that part of the street which had been graded. It exempts from a liability to render an equivalent for the benefits arising from the improvement, all other property in the vicinity, no matter how much it may have been benefited. The contention is, that this law, therefore, arbitrarily designates a tax area of its own, which does not coincide with any political district, or subdivision of such district, and that it does not embrace the whole of the class of land-owners whose property is enhanced in value, but only a portion of such class.

“I think this law is clearly subject to these imputations. It is plain that it sets off a small portion of the territory of that city, and subjects it to this particular imposition, and if, consequently, we are to regard these assessments which are made against

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[114 Mass. 388.]

H. W. Paine and C. E. Hubbard, for the petitioners. J. W. Hammond, for the respondent.

the land-owner for benefits conferred upon his property by this class of public works, as ordinary exercises of the taxing power, I confess I do not see how they are to be vindicated. In *State, Baldwin, pros. v. Fuller*, 10 Vroom, 576; 11 Id. 615, it was explicitly decided, first in the Supreme Court and then in this court, that the legislature could not, of its own will, and without being justified for so doing, from the nature of things, lay off any particular portion of territory for the purpose of putting a peculiar tax upon it. Such an act was pronounced to be not a legitimate act of taxation, looking at it in the light of general legal principles. That decision was the product of legal rules correctly applied, and should not, in any degree, be disturbed.

"But still the question presses, are these assessments to be treated and regulated by the same rules that confine and trammel legislation in its ordinary uses? And upon full consideration, my conclusion is, that they are not to be so regarded, and that the power in such instances exercised is *sui generis*. The right of the public to improve a man's property against his will, and to make him pay the expense, calling it a tax, has always seemed to me a kind of procedure very dissimilar from ordinary acts of legislation. But such exercises of authority, however abnormal they may seem when tested by theory, have too long prevailed, both in this State and elsewhere, to be now called in question. The existence of the legislative power, in this province, has been settled by long usage and oft-repeated judicial recognition. And in many instances, and for a long period of time, it has been put in force in the form that is now in this case exclaimed against, for assessments confined to the lands fronting on the improved street are not novelties, but have always been a part of this exceptional system. So, likewise, such partial impositions have been, from time to time, at least tacitly assented to by the courts in the State, and various assessments made under laws containing this feature have been sustained by this court of last resort. And it is likewise impossible to forget the fact that there is at present much of the legislation of the State largely affecting municipal interests of great magnitude, which has grown up by reason of such apparent judicial sanction. In this state of affairs, it seems to me that the practice now in question must be taken to be a recognized part of that ancient and inveterate plan which has been resorted to in taxing the land-owner for the special benefit that a public improvement of this kind has imparted to his property. Viewing it in this light, it cannot, at this late day, be discarded.

"With respect to the other exceptions to these proceedings and this Act, I have found nothing in them of such weight as to require any discussion at my hands. On these subjects, I concur in the views presented in the Supreme Court."

And so *State v. Mayor of Bayonne*, 29 Atl. Rep. 713 (N. J. Ct. of App., Feb. 1894); *Beaumont v. Wilkes Barre*, 142 Pa. 198 (1891) Compare *State v. Brill*, 59 N. W. Rep. 989 (Minn., July, 1894).

Hammitt v. Phil., 65 Pa. 146 (1870), in a case of re-paying a street, holds local assessments unconstitutional, while sustaining them if limited to laying the original paving. SHARSWOOD, J., for the court: "It would lead to monstrous injustice and inequality should such general expenses be provided for by local assessments." But see the learned and full dissenting opinion of READ, J., at p. 157. The case was affirmed in *Harrisburgh v. Seigelbaum*, 151 Pa. 172 (1892). — ED. 35 N. E. R. 943

1. The statement of facts is omitted. — ED.

impose special assessments is a legislative one.
The act was not objectionable because the rule
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COLT, J. The St. of 1863, c. 191, authorizes the mayor and aldermen of the city of Cambridge to assess upon the abutters in just proportions the expense of the edge-stones and covering materials for sidewalks constructed under their order. Assessments have been made under this Act, and the plaintiffs, in a petition for a writ of *certiorari*, object to their validity, and ask that the city may be prevented from collecting them.

It is alleged that the Act is unconstitutional. 1. Because no right of appeal to a jury is given to a party aggrieved by the doings of the mayor and aldermen. But in cases like this, there is no right of appeal secured by the Constitution. The purpose of the Act is to provide for certain local improvements in public streets, the expense of which shall be partly borne by those immediately interested and whose estates are benefited thereby. It has been repeatedly held by this court that this is a mode of taxation which the legislature may well adopt. It is clearly distinguishable from the exercise of the right of eminent domain, and does not, like that, require that a right of appeal to a jury should be secured. (*Jones v. Aldermen of Boston*, 104 Mass. 461, 467; *Salem Turnpike v. Essex*, 100 Mass. 282, 287; *Goddard, petitioner*, 16 Pick. 504.

2. As an exercise of the power of taxation, the Act is objected to as unconstitutional, because the rule of proportion to be followed in making assessments has not been fixed by the legislature. The Act provides that a definite portion of the expense of the improvement, namely, the cost of the edge-stones and covering materials, "shall be assessed upon the abutters in just proportions," deducting from the assessment all sums which may have been previously paid to the city by the tax-payer for previous improvements. This plainly requires that the assessment be laid equally upon the abutting estates, which, from the nature of the work, must be immediately benefited. The limits of the locality subject to the burden are fixed by the Act with sole reference to these special benefits, and a rule is given by which the entire expense is divided between the abutters and the city. The rule of apportionment is uniform throughout the taxing district, and sufficiently approaches equality. The principle of taxation here adopted has been repeatedly applied by the legislature with reference to sidewalks and other local improvements, and under the decisions of this court the power is not open to constitutional objection. *Lowell v. Hadley*, 8 Met. 180; *Springfield v. Gay*, 12 Allen, 612; *Goddard, pet'r*, *supra*; *Salem Turnpike v. Essex*, *supra*; *Haverhill Bridge v. County Commissioners*, 103 Mass. 120; *Dow v. Wakefield*, 103 Mass. 267; *Carter v. Cambridge Bridge*, 104 Mass. 236; *Dorgan v. Boston*, 12 Allen, 223, 235, 240; *Jones v. Boston*, 104 Mass. 461, 467.

3. It is finally objected that the mayor and aldermen, under the power given them, did not in fact assess the abutters in just proportions. The case is reserved upon petition and answer and upon the facts disclosed. We cannot say, as matter of law, that the principle

adopted by the board was not in compliance with the requirements of the Act, or that under it the assessment was made in unjust proportion.

*Petition dismissed.*¹

In *Ill. Cent. R. R. Co. v. Decatur*, 147 U. S. 190 (1893), on error to the Supreme Court of Illinois, BREWER, J. for the court, said: "The single question in this case is, whether this special tax for a local improvement is within the exemption from taxation granted to the railroad company by section 22 of the Act of 1851.

"Between taxes, or general taxes, as they are sometimes called by way of distinction, which are the exactions placed upon the citizen for the support of the government, paid to the State as a State, the consideration of which is protection by the State, and special taxes or special assessments, which are imposed upon property within a limited area for the payment for a local improvement supposed to enhance the value of all property within that area, there is a broad and clear line of distinction, although both of them are properly called taxes, and the proceedings for their collection are by the same officers and by substantially similar methods. Taxes proper, or general taxes, proceed upon the theory that the existence of government is a necessity; that it cannot continue without means to pay its expenses; that for those means it has the right to compel all citizens and property within its limits to contribute; and that for such contribution it renders no return of special benefit to any property, but only secures to the citizen that general benefit which results from protection to his person and property, and the promotion of those various schemes which have for their object the welfare of all. 'The public revenues are a portion that each subject gives of his property in order to secure or enjoy the remainder.' Montesq. Spirit of the Laws, book 13, c. 1: *Loun Association v. Topeka*, 20 Wall. 655, 664; Opinions of Judges, 58 Maine, 591; *Hanson v. Vernon*, 27 Iowa, 28, 47; *Judd v. Driver*, 1 Kans. 455, 462; *Philadelphia Association v. Wood*, 39 Penn. St. 73, 82; *Exchange Bank v. Hines*, 3 Ohio St. 1, 10.

"On the other hand, special assessments or special taxes proceed upon the theory that when a local improvement enhances the value of neighboring property that property should pay for the improvement. In *Wright v. Boston*, 9 Cush. 233, 241, Chief Justice Shaw said: 'When certain persons are so placed as to have a common interest among themselves, but in common with the rest of the community, laws may justly be made, providing that, under suitable and equitable regulations, those common interests shall be so managed, that those who enjoy the benefits shall equally bear the burden.' In *McGonigle v. Alleghany City*, 44 Penn. St. 118, 121, is this declaration: 'All these municipal taxes for improvement of streets, rest, for their final reason, upon the

¹ And so *White v. The People*, 94 Ill. 604 (1880), holding that the legislature may authorize the entire cost of a side-walk to be assessed on the abutters, and that thereafter the question of the relation of the cost to the special benefit is not open. — Ed.

general taxes proceed upon the theory that the existence of govt. is a necessity; that the govt. has a right to compel all citizens and prop. within its limits

But special assessments proceed upon the theory that when a local improvement

enhancement of private properties.' In *Litchfield v. Vernon*, 41 N. Y. 123, 133, it was stated that the principle is, 'that the territory subjected thereto would be benefited by the work and change in question.' . . .

"These distinctions have been recognized and stated by the courts of almost every State in the Union, and a collection of the cases may be found in any of the leading text-books on taxation. Founded on this distinction is a rule of very general acceptance, — that an exemption from taxation is to be taken as an exemption simply from the burden of ordinary taxes, taxes proper, and does not relieve from the obligation to pay special assessments. Thus in an early case, *In the Matter of the Mayor, &c. of New York*, 11 Johns. 77, 80, under a statute which provided that no church or place of public worship 'should be taxed by any law of this State,' the court observed: 'The word *'taxes'* means burdens, charges or impositions put or set upon persons or property for public uses, and this is the definition which Lord Coke gives to the word *talliage* (2 Inst. 532), and Lord Holt, in *Carth.* 438, gives the same definition, in substance, of the word *tax*. The legislature intended, by that exemption, to relieve religious and literary institutions from these public burdens, and the same exemption was extended to the real estate of any minister, not exceeding in value fifteen hundred dollars. But to pay for the opening of a street, in a *ratio* to the 'benefit or advantage' derived from it, is no burden. It is no talliage or tax within the meaning of the exemption, and has no claim upon the public benevolence. Why should not the real estate of a minister, as well as of other persons, pay for such an improvement in proportion as it is benefited? There is no inconvenience or hardship in it, and the maxim of law that *qui sentit commodum debet sentire onus*, is perfectly consistent with the interests and dictates of science and religion.' . . .

"Indeed, the rule has been so frequently enforced that, as a general proposition, it may be considered as thoroughly established in this country. It is unnecessary to refer to the cases generally. It may be well, however, to notice those from Illinois. . . . Nor is this a mere arbitrary distinction created by the courts, but one resting on strong and obvious reasons. A grant of exemption is never to be considered as a mere gratuity — a simple gift from the legislature. No such intent to throw away the revenues of the State, or to create arbitrary discriminations between the holders of property, can be imputed. A consideration is presumed to exist. The recipient of the exemption may be supposed to be doing part of the work which the State would otherwise be under obligations to do. A college, or an academy, furnishes education to the young, which it is a part of the State's duty to furnish. The State is bound to provide highways for its citizens, and a railroad company in part discharges that obligation. Or the recipient may be doing a work which adds to the material prosperity or elevates the moral character of the people; manufactories have been exempted, but only in the belief that thereby large industries will be created and

to Harvard College. The language of the charter was broad enough to cover all civil impositions — a special assessment could not be levied against it.

the material prosperity increased; churches and charitable institutions, because they tend to a better order of society. Or it may be that a sum, in gross or annual instalments, is received in lieu of taxes. But in every case there is the implied fact of some consideration passing for the grant of exemption. But those considerations as a rule pass to the public generally, and do not work the enhancement of the value of any particular area of property. So when the consideration is received by the public as a whole, the exemption should be and is of that which otherwise would pass to such public, to wit, general taxes.

“ Another matter is this: In a general way it may be said that the probable amount of future taxes can be estimated. While of course no mathematical certainty exists, yet there is a reasonable uniformity in the expenses of the government, so that there can be in advance an approximation of what is given when an exemption from taxation is granted, if only taxes proper are within the grant. But when you enter the domain of special assessments there is no basis for estimating in advance what may be the amount of such assessments. Who can tell what the growth of the population will be in the vicinity of the exempted property? Will there be only a little village or a large city? Will the local improvements which the business interests of that vicinity demand be trifling in amount, or very large? What may be the improvements which the necessities of the case demand? Nothing can be more indefinite and uncertain than these matters; and it is not to be expected that the legislature would grant an exemption of such unknown magnitude with no corresponding return of consideration therefor.

“ And, again, as special assessments proceed upon the theory that the property charged therewith is enhanced in value by the improvement, the enhancement of value being the consideration for the charge, upon what principles of justice can one tract within the area of the property enhanced in value be released from sharing in the expense of such improvement? Is there any way in which it returns to the balance of the property within that area any equivalent for a release from a share in the burden? Whatever may be the supposed consideration to the public for an exemption from general taxation, does it return to the property within the area any larger equivalent with the improvement than without it? If it confers a benefit upon the public, whether the general public or that near at hand, a benefit which justifies an exemption from taxation, does it confer any additional benefit upon the limited area by reason of sharing in the enhanced value springing from the improvement? Obviously not. The local improvement has no relation to or effect upon that which the exempted property gives to the public as consideration for its exemption; hence, there is manifest inequity in relieving it from a share of the cost of the improvement. So when the rule is laid down that the exemption from taxation only applies to taxes proper it is not a mere arbitrary rule, but one founded upon principles of natural justice.

“ But it is said that it is within the competency of the legislature, hav-

ing full control over the matter of general taxation and special assessments, to exempt any particular property from the burden of both, and that it is not the province of the courts, when such entire exemption has been made, to attempt to limit or qualify it upon their own ideas of natural justice. Thus in the case of *Harvard College v. Boston*, 104 Mass. 470, an assessment for altering a street was held within the language of the college charter exempting the property 'from all civil impositions, taxes, and rates.' See also the following authorities: *Brightman v. Kirner*, 22 Wis. 54; *Southern Railroad Co. v. Jackson*, 38 Miss. 334; *New Jersey v. Newark*, 3 Dutch. (27 N. J. Law) 185; *Erie v. First Universalist Church*, 105 Penn. St. 278; *Olive Cemetery Co. v. Philadelphia*, 93 Penn. St. 129; *Richmond v. Richmond & Danville Railroad*, 21 Gratt. 604. This is undoubtedly true. So we turn to the language employed in granting this exemption to see what the legislature intended. . . .

"But, finally, it is urged that if this exemption does not include special assessments, the Constitution of Illinois of 1870 recognizes a distinction between special taxes and special assessments, and that in this case the charges are special taxes rather than special assessments, and therefore to be included within the exemption of the charter. Section 2 of article 9 of the Constitution of 1848, which was in force at the time of the charter of the railroad company, is as follows: 'The general assembly shall provide for levying a tax by valuation, so that every person or corporation shall pay a tax in proportion to his or her property.' Section 5 of the same article contained this as to local taxation: 'The corporate authorities of counties, townships, school districts, cities, towns and villages may be vested with power to assess and collect taxes for corporate purposes; such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same;' while in section 11 of article 3 was the ordinary provision that no property should be taken or applied to public use without just compensation. And under that Constitution it was ruled, in the case of *Chicago v. Larned*, 34 Ill. 203, that 'an assessment for improvements made on the basis of the frontage of lots upon the street to be improved is invalid, containing neither the element of equality nor uniformity if assessed under the taxing powers, and equally invalid if in the exercise of the right of eminent domain, no compensation being provided.' In quite an elaborate opinion the court held substantially that special assessments could only be imposed in proportion to the benefits actually received by the property upon which they were charged, and that in the absence of an ascertainment of such special benefits the expense must be borne by the entire property of the city. This decision was reaffirmed in *Ottawa v. Spencer*, 40 Ill. 211. Subsequently, and in 1870, a new Constitution was adopted, section 9 of article 9 of which is as follows: 'The general assembly may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessment, or by special

taxation of contiguous property or otherwise. For all corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, but such taxes shall be uniform, in respect to persons and property, within the jurisdiction of the body imposing the same." And this came before the Supreme Court in the case of *White v. The People, ex rel.*, 94 Ill. 604, and it was held that the city council had power to charge the cost of a sidewalk upon the lots touching it, in proportion to their frontage thereon; that whether or not the special tax exceeded the actual benefit to the lots taxed, was not material; that it may be supposed to be based upon a presumed equivalent; and that where the proper authorities determined the frontage to be the proper measure of benefits, this determination could be neither disputed nor disproved, and the cases in 34 and 40 Illinois, *supra*, were held to be inapplicable. This decision has been reaffirmed in *Craw v. Tolono*, 96 Ill. 255; *Enos v. Springfield*, 113 Ill. 65; *Sterling v. Galt*, 117 Ill. 11; *Springfield v. Green*, 120 Ill. 269.

"But the difference between the two Constitutions is simply in the mode of ascertaining the benefits, and does not change the essential fact that a charge like the one here in controversy is for the cost of a local improvement, and is charged upon the contiguous property upon the theory that it is benefited thereby. This is the interpretation put upon the matter by the Supreme Court of Illinois. In *White v. People*, 94 Ill. 605, 613, it was said: 'Whether or not the special tax exceeds the actual benefit to the lot, is not material. It may be supposed to be based on a presumed equivalent. The city council have determined the frontage to be the proper measure of probable benefits. That is generally considered as a very reasonable measure of benefits in the case of such an improvement.' So also in *Craw v. Tolono, supra*, it is said: 'Special taxation as spoken of in our Constitution is based upon the supposed benefit to the contiguous property, and differs from special assessments only in the mode of ascertaining the benefits. In the case of special taxation, the imposition of the tax by the corporate authorities is of itself a determination that the benefits to the contiguous property will be as great as the burden of the expense of the improvement, and that such benefits will be so nearly limited, or confined in their effect, to contiguous property, that no serious injustice will be done by imposing the whole expense upon such property.' And in *Sterling v. Galt, supra*, in which the difference between special assessment and special taxation was noticed, it was held that the whole of the burden in case of special taxation was imposed upon the contiguous property upon the hypothesis that the benefits will be equal to the burden.

"We do not suppose that the company had by its charter any contract with the State that the matter of special benefit resulting from a local improvement should be ascertained and determined only in the then existing way. There was nothing in the terms of that contract to prevent the State from committing the final determination of the question

of benefits to the city council rather than leaving the matter of ascertainment to a jury. And whether the charges are called special taxes or special assessments, and by whatever tribunal or by whatever mode the question of benefits may be determined, the fact remains that the charges are for a local improvement, and cast upon the contiguous property, upon the assumption that it has received a benefit from such improvement, which benefit justifies the charge. The charges here are not taxes proper, are not contributions to the State or to the city for the purpose of enabling either to carry on its general administration of affairs, but are a charge only and specially for the cost for a local improvement, supposed to have resulted in an enhancement of the value of the railroad company's property. It is not in lieu of such charges that the company pays annually the stipulated per cent of its gross revenues into the State treasury.

"We see no error in the rulings of the Supreme Court of Illinois, and its judgment is *Affirmed.*"¹

HYLTON v. THE UNITED STATES.

SUPREME COURT OF THE UNITED STATES. 1796.

[3 Dall. 171; 1 Curtis's Decisions, 150.2]

THIS was a writ of error to the Circuit Court of the United States for the district of Virginia. The question raised, and all the facts necessary to be adverted to, appear in the opinions of the members of the court. The cause was argued by the *Attorney-General* and *Hamilton*, in support of the tax, and by *Campbell*, district attorney for the district of Virginia, and *Ingersoll*, the attorney-general of Pennsylvania, in opposition to it.

The court delivered their opinions *seriatim*, in the following terms.³

CHASE, J. By the case stated, only one question is submitted to the opinion of this court: Whether the law of Congress of the 5th of June, 1794 (1 U. S. St. at Large, 373), entitled, "An Act to lay duties upon carriages for the conveyance of persons," is unconstitutional and void? . . .

¹ Compare *Speer v. Mayor, &c. of Athens*, 85 Geo. 49 (1890); *Mayor, &c. of Birmingham v. Klein*, 89 Ala. 461 (1889); *Winona & St. P. R. R. Co. v. Watertown*, 44 N. W. Rep. 1072 (So Dak. 1890); *Munson v. Bd. Com'rs Atchafalaya Dist.*, 43 La. 15 (1891); *McAleer et al. v. Hull*, 27 Pac. Rep. (Wash. 1891); *Denver et al. v. Knowles*, 17 Col. 204 (1892), overruling *Palmer v. Way*, 6 Col. 106. Compare a cautious intermediate answer of the judges to the legislature, in *In re House Resolutions*, 15 Cal. 598 (1891); s. c. 26 Pac. Rep. 323. — ED.

² The case is taken from Curtis's Decisions. — ED.

³ The Chief Justice, ELLSWORTH, was sworn into office in the morning; but not having heard the whole of the argument, he declined taking any part in the decision of this cause.

must be apportioned. (2) All duties, imposts, and excises must be uniform. If the tax on carriages is a direct tax it must be apportioned. If it be a

the sense of the Const.

being a direct tax it was entirely competent for Congress

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HYLTON v. UNITED STATES.

[CHAP. VII.

The Constitution evidently contemplated no taxes as direct taxes, but only such as Congress could lay in proportion to the census. The rule of apportionment is only to be adopted in such cases where it can reasonably apply; and the subject taxed must ever determine the application of the rule.

If it is proposed to tax any specific article by the rule of apportionment, and it would evidently create great inequality and injustice, it is unreasonable to say that the Constitution intended such tax should be laid by that rule.

It appears to me that a tax on carriages cannot be laid by the rule of apportionment, without very great inequality and injustice. For example, suppose two States equal in census, to pay eight thousand dollars each, by a tax on carriages of eight dollars on every carriage, and in one State there are one hundred carriages, and in the other one thousand. The owners of carriages in one State would pay ten times the tax of owners in the other. A, in one State, would pay for his carriage eight dollars; but B, in the other State, would pay for his carriage, eighty dollars.

It was argued that a tax on carriages was a direct tax, and might be laid according to the rule of apportionment, and, as I understood, in this manner: Congress, after determining on the gross sum to be raised, was to apportion it according to the census, and then lay it in one State on carriages, in another on horses, in a third on tobacco, in a fourth on rice; and so on. I admit that this mode might be adopted to raise a certain sum in each State, according to the census, but it would not be a tax on carriages, but on a number of specific articles; and it seems to me that it would be liable to the same objection of abuse and oppression, as a selection of any one article in all the States.

I think an annual tax on carriages for the conveyance of persons, may be considered as within the power granted to Congress to lay duties. The term duty is the most comprehensive next to the general term tax; and practically in Great Britain, whence we take our general ideas of taxes, duties, imposts, excises, customs, &c., embraces taxes on stamps, tolls for passage, &c., &c., and is not confined to taxes on importation only.

It seems to me that a tax on expense is an indirect tax; and I think an annual tax on a carriage for the conveyance of persons, is of that kind; because a carriage is a consumable commodity, and such annual tax on it is on the expense of the owner.

I am inclined to think, but of this I do not give a judicial opinion, that the direct taxes contemplated by the Constitution, are only two, to wit, a capitation or poll tax, simply without regard to property, profession, or any other circumstance; and a tax on land. I doubt whether a tax, by a general assessment of personal property, within the United States, is included within the term direct tax.

As I do not think the tax on carriages is a direct tax, it is unneces-

1. capitation (or a poll) tax on land

2. tax on carriages is not a direct tax in the sense of

a direct tax. What is the test? Is a tax
is not in a reasonable sense apportionable.

sary at this time for me to determine whether this court constitutionally possesses the power to declare an Act of Congress void, on the ground of its being made contrary to, and in violation of the Constitution; but if the court have such power, I am free to declare, that I will never exercise it but in a very clear case.

I am for affirming the judgment of the Circuit Court.

PATERSON, J. . . . What are direct taxes within the meaning of the Constitution? The Constitution declares that a capitation tax is a direct tax; and both in theory and practice, a tax on land is deemed to be a direct tax. In this way, the terms direct taxes, and capitation and other direct tax, are satisfied. It is not necessary to determine, whether a tax on the product of land be a direct or indirect tax. Perhaps the immediate product of land, in its original and crude state, ought to be considered as the land itself; it makes part of it, or else the provision made against taxing exports would be easily eluded. Land, independently of its produce, is of no value. When the produce is converted into a manufacture it assumes a new shape; its nature is altered, its original state is changed, it becomes quite another subject, and will be differently considered. Whether direct taxes, in the sense of the Constitution, comprehend any other tax than a capitation tax, and tax on land, is a questionable point. If Congress, for instance, should tax, in the aggregate or mass, things that generally pervade all the States in the Union, then perhaps the rule of apportionment would be the most proper, especially if an assessment was to intervene. This appears, by the practice of some of the States, to have been considered as a direct tax. Whether it be so under the Constitution of the United States is a matter of some difficulty; but as it is not before the court, it would be improper to give any decisive opinion upon it. I never entertained a doubt that the principal, I will not say the only objects, that the framers of the Constitution contemplated as falling within the rule of apportionment, were a capitation tax and a tax on land. Local considerations, and the particular circumstances and relative situation of the States, naturally lead to this view of the subject. The provision was made in favor of the Southern States. They possessed a large number of slaves; they had extensive tracts of territory, thinly settled and not very productive. A majority of the States had but few slaves, and several of them a limited territory, well settled, and in a high state of cultivation. The Southern States, if no provision had been introduced in the Constitution, would have been wholly at the mercy of the other States. Congress in such case might tax slaves, at discretion or arbitrarily, and land in every part of the Union after the same rate or measure; so much a head in the first instance, and so much an acre in the second. To guard them against imposition, in these particulars, was the reason of introducing the clause in the Constitution which directs that representatives and direct taxes shall be apportioned among the States according to their respective numbers. . . .

I shall close the discourse with reading a passage or two from Smith's Wealth of Nations.

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"The impossibility of taxing people in proportion to their revenue by any capitation, seems to have given occasion to the invention of taxes upon consumable commodities; the State not knowing how to tax directly and proportionably the revenue of its subjects, endeavors to tax it indirectly by taxing their expense, which it is supposed in most cases will be nearly in proportion to their revenue. Their expense is taxed by taxing the consumable commodities upon which it is laid out." Vol. iii. 331.

"Consumable commodities, whether necessities or luxuries, may be taxed in two different ways; the consumer may either pay an annual sum on account of his using or consuming goods of a certain kind, or the goods may be taxed while they remain in the hands of the dealer, and before they are delivered to the consumer. The consumable goods, which last a considerable time before they are consumed altogether, are most properly taxed in the one way; those of which the consumption is immediate, or more speedy, in the other; the coach tax and plate tax are examples of the former method of imposing; the greater part of the other duties of excise and customs, of the latter." Vol. iii. p. 341.

I am, therefore, of opinion that the judgment rendered in the Circuit Court of Virginia ought to be affirmed.

IREDELL, J. I agree in opinion with my brothers, who have already expressed theirs, that the tax in question is agreeable to the Constitution; and the reasons which have satisfied me can be delivered in a very few words, since I think the Constitution itself affords a clear guide to decide the controversy.

The Congress possess the power of taxing all taxable objects, without limitation, with the particular exception of a duty on exports.

There are two restrictions only on the exercise of this authority —

1. All direct taxes must be apportioned. 2. All duties, imposts, and excises must be uniform.

If the carriage tax be a direct tax, within the meaning of the Constitution, it must be apportioned. If it be a duty, impost, or excise, within the meaning of the Constitution, it must be uniform.

If it can be considered as a tax, neither direct within the meaning of the Constitution, nor comprehended within the term duty, impost, or excise; there is no provision in the Constitution. one way or another, and then it must be left to such an operation of the power, as if the authority to lay taxes had been given generally in all instances, without saying whether they should be apportioned or uniform; and in that case, I should presume, the tax ought to be uniform; because the present Constitution was particularly intended to affect individuals, and not States, except in particular cases specified; and this is the leading distinction between the Articles of Confederation and the present Constitution.

As all direct taxes must be apportioned, it is evident that the Constitution contemplated none as direct but such as could be apportioned.

line of reasoning is now condemned. Absurdity of results is not thought to be a test today by

If this cannot be apportioned, it is, therefore, not a direct tax in the sense of the Constitution.

That this tax cannot be apportioned is evident. Suppose ten dollars contemplated as a tax on each chariot, or post chaise, in the United States, and the number of both in all the United States be computed at one hundred and five, the number of representatives in Congress, — this would produce in the whole one thousand and fifty dollars; the share of Virginia, being 19-105 parts, would be one hundred and ninety dollars; the share of Connecticut, being 7-105 parts, would be seventy dollars; then suppose Virginia had fifty carriages, Connecticut two, the share of Virginia being one hundred and ninety dollars, this must of course be collected from the owners of carriages, and there would therefore be collected from each carriage three dollars and eighty cents; the share of Connecticut being seventy dollars, each carriage would pay thirty-five dollars.

If any State had no carriages, there could be no apportionment at all. This mode is too manifestly absurd to be supported, and has not even been attempted in debate. But two expedients have been proposed of a very extraordinary nature to evade the difficulty.

1. To raise the money a tax on carriages would produce, not by laying a tax on each carriage uniformly, but by selecting different articles in different States, so that the amount paid in each State may be equal to the sum due upon a principle of apportionment. One State might pay by a tax on carriages, another by a tax on slaves, &c.

I should have thought this merely an exercise of ingenuity, if it had not been pressed with some earnestness; and as this was done by gentlemen of high respectability in their profession, it deserves a serious answer, though it is very difficult to give such a one. 1. This is not an apportionment, of a tax on carriages, but of the money a tax on carriages might be supposed to produce, which is quite a different thing. 2. It admits that Congress cannot lay an uniform tax on all carriages in the Union, in any mode, but that they may on carriages in one or more States. They may therefore lay a tax on carriages in fourteen States, but not in the fifteenth. 3. If Congress, according to this new decree, may select carriages as a proper object, in one or more States, but omit them in others, I presume they may omit them in all, and select other articles.

Suppose, then, a tax on carriages would produce \$100,000, and a tax on horses a like sum, \$100,000, and \$100,000 were to be apportioned according to that mode; gentlemen might amuse themselves with calling this a tax on carriages, or a tax on horses, while not a single carriage, nor a single horse was taxed throughout the Union.

4. Such an arbitrary method of taxing different States differently, is a suggestion altogether new, and would lead, if practised, to such dangerous consequences that it will require very powerful arguments to show that that method of taxing would be in any manner compatible with the Constitution, with which at present, I deem it utterly

irreconcilable, it being altogether destructive of the notion of a common interest, upon which the very principles of the Constitution are founded, so far as the condition of the United States will admit.

The second expedient proposed was, that of taxing carriages, among other things, in a general assessment. This amounts to saying that Congress may lay a tax on carriages, but that they may not do it unless they blend it with other subjects of taxation. For this, no reason or authority has been given, and in addition to other suggestions offered by the counsel on that side, affords an irrefragable proof, that when positions plainly so untenable are offered to counteract the principle contended for by the opposite counsel, the principle itself is a right one; for, no one can doubt, that if better reasons could have been offered, they would not have escaped the sagacity and learning of the gentlemen who offered them.

There is no necessity or propriety in determining what is, or is not a direct or indirect tax in all cases.

Some difficulties may occur which we do not at present foresee. Perhaps a direct tax, in the sense of the Constitution, can mean nothing but a tax on something inseparably annexed to the soil, something capable of apportionment under all such circumstances.

A land or a poll tax may be considered of this description.

The latter is to be considered so particularly under the present Constitution, on account of the slaves in the Southern States, who give a ratio in the representation in the proportion of three to five.

Either of these is capable of apportionment. In regard to other articles, there may possibly be considerable doubt.

It is sufficient, on the present occasion, for the court to be satisfied that this is not a direct tax contemplated by the Constitution, in order to affirm the present judgment; since, if it cannot be apportioned, it must necessarily be uniform.

I am clearly of opinion this is not a direct tax in the sense of the Constitution, and, therefore, that the judgment ought to be affirmed.

[WILSON, J., gave a short concurring opinion. CUSHING, J., not having heard the arguments, excused himself.]

BY THE COURT. Let the judgment of the Circuit Court be affirmed.¹

¹ See *Loughborough v. Blake*, 5 Wheat. 317. — ED.

SPRINGER v. UNITED STATES.

SUPREME COURT OF THE UNITED STATES. 1880.

[102 U. S. 586.]

[ERROR to the Circuit Court of the United States for the Southern District of Illinois. Action of ejectment brought by the United States to recover land, levied upon and sold to the United States for the amount of an income tax due from Springer. The case came up on exceptions.] *Mr. William M. Springer*, for the plaintiff in error. *Mr. Assistant Attorney-General Smith*, *contra*.

MR. JUSTICE SWAYNE, after stating the facts, delivered the opinion of the court.

The central and controlling question in this case is whether the tax which was levied on the income, gains, and profits of the plaintiff in error, as set forth in the record, and by pretended virtue of the Acts of Congress and parts of Acts therein mentioned, is a direct tax. . . . If it was, not having been laid according to the requirements of the Constitution, it must be admitted that the laws imposing it, and the proceedings taken under them by the assessor and collector for its imposition and collection, were all void.

Many of the provisions of the Articles of Confederation of 1777 were embodied in the existing organic law. They provided for a common treasury and the mode of supplying it with funds. The latter was by requisitions upon the several States. The delays and difficulties in procuring the compliance of the States, it is known, was one of the causes that led to the adoption of the present Constitution. This clause of the articles throws no light on the question we are called upon to consider. Nor does the journal of the proceedings of the constitutional convention of 1787 contain anything of much value relating to the subject.

It appears that on the 11th of July, in that year, there was a debate of some warmth involving the topic of slavery. On the day following, *Gouverneur Morris*, of New York, submitted a proposition "that taxation shall be in proportion to representation." It is further recorded in this day's proceedings, that *Mr. Morris* having so varied his motion by inserting the word "direct," it passed *nem. con.*, as follows: "Provided always that direct taxes ought to be proportioned to representation." 2 *Madison Papers*, by *Gilpin*, pp. 1079-1081.

On the 24th of the same month, *Mr. Morris* said that "he hoped the committee would strike out the whole clause. . . . He had only meant it as a bridge to assist us over a gulf; having passed the gulf, the bridge may be removed. He thought the principle laid down with so much strictness liable to strong objections." *Id.* 1197. The gulf was the share of representation claimed by the Southern States on

¹ The statement of facts is omitted. — Ed.

on real estate and the tax on income is more an excise or duty.

Did not appear here what the source of the tax

account of their slave population. But the bridge remained. The builder could not remove it, much as he desired to do so. All parties seem thereafter to have avoided the subject. With one or two immaterial exceptions, not necessary to be noted, it does not appear that it was again adverted to in any way. It was silently incorporated into the draft of the Constitution as that instrument was finally adopted.

It does not appear that an attempt was made by any one to define the exact meaning of the language employed.

In the twenty-first number of the "Federalist," Alexander Hamilton, speaking of taxes generally, said: "Those of the direct kind, which principally relate to land and buildings, may admit of a rule of apportionment. Either the value of the land, or the number of the people, may serve as a standard." The thirty-sixth number of that work, by the same author, is devoted to the subject of internal taxes. It is there said, "They may be subdivided into those of the direct and those of the indirect kind." In this connection land-taxes and poll-taxes are discussed. The former are commended and the latter are condemned. Nothing is said of any other direct tax. In neither case is there a definition given or attempted of the phrase "direct tax."

The very elaborate researches of the plaintiff in error have furnished us with nothing from the debates of the State conventions, by whom the Constitution was adopted, which gives us any aid. Hence we may safely assume that no such material exists in that direction, though it is known that Virginia proposed to Congress an amendment relating to the subject, and that Massachusetts, South Carolina, New York, and North Carolina expressed strong disapprobation of the power given to impose such burdens. 1 Tucker's Blackstone, pt. 1, app., 235.

Perhaps the two most authoritative persons in the convention touching the Constitution were Hamilton and Madison. The latter, in a letter of May 11, 1794, speaking of the tax which was adjudicated upon in *Hylton v. United States* (3 Dall. 171), said, "The tax on carriages succeeded in spite of the Constitution by a majority of twenty, the advocates of the principle being reinforced by the adversaries of luxury." 2 Mad. Writings (pub. by Congress), p. 14. In another letter, of the 7th of February, 1796, referring to the case of *Hylton v. United States*, then pending, he remarked: "There never was a question on which my mind was better satisfied, and yet I have very little expectation that it will be viewed in the same light by the court that it is by me." Id. 77. Whence the despondency thus expressed is unexplained.

Hamilton left behind him a series of legal briefs, and among them one entitled "Carriage Tax." See vol. vii. p. 848, of his works. This paper was evidently prepared with a view to the *Hylton* case, in which he appeared as one of the counsel for the United States. In it he says: "What is the distinction between direct and indirect taxes? It is a matter of regret that terms so uncertain and vague in so import-

... is now overruled.

ant a point are to be found in the Constitution. We shall seek in vain for any antecedent settled legal meaning to the respective terms. There is none. We shall be as much at a loss to find any disposition of either which can satisfactorily determine the point." There being many carriages in some of the States, and very few in others, he points out the preposterous consequences if such a tax be laid and collected on the principle of apportionment instead of the rule of uniformity. He insists that if the tax there in question was a direct tax, so would be a tax on ships, according to their tonnage. He suggests that the boundary line between direct and indirect taxes be settled by "a species of arbitration," and that direct taxes be held to be only "capitation or poll taxes, and taxes on lands and buildings, and general assessments, whether on the whole property of individuals or on their whole real or personal estate. All else must, of necessity, be considered as indirect taxes."

The tax here in question falls within neither of these categories. It is not a tax on the "whole . . . personal estate" of the individual, but only on his income, gains, and profits during a year, which may have been but a small part of his personal estate, and in most cases would have been so. This classification lends no support to the argument of the plaintiff in error.

The Constitution went into operation on the 4th of March, 1789.

It is important to look into the legislation of Congress touching the subject since that time. The following summary will suffice for our purpose. We shall refer to the several Acts of Congress to be examined, according to their sequence in dates. In all of them the aggregate amount required to be collected was apportioned among the several States.

The Act of July 14, 1798, c. 75, 1 Stat. 53. This Act imposed a tax upon real estate and a capitation tax upon slaves.

The Act of Aug. 2, 1813, c. 37, 3 Id. 53. By this Act the tax was imposed upon real estate and slaves, according to their respective values in money.

The Act of Jan. 19, 1815, c. 21, Id. 164. This Act imposed the tax upon the same descriptions of property, and in like manner as the preceding Act.

The Act of Feb. 27, 1815, c. 60, Id. 216, applied to the District of Columbia the provisions of the Act of Jan. 19, 1815.

The Act of March 5, 1816, c. 24, Id. 255, repealed the two preceding Acts, and re-enacted their provisions to enforce the collection of the smaller amount of tax thereby prescribed.

The Act of Aug. 5, 1861, c. 45, 12 Id. 294, required the tax to be levied wholly on real estate.

The Act of June 7, 1862, c. 98, Id. 422, and the Act of Feb. 6, 1863, c. 21, Id. 640, both relate only to the collection, in insurrectionary districts, of the direct tax imposed by the Act of Aug. 5, 1861, and need not, therefore, be more particularly noticed.

It will thus be seen that whenever the government has imposed a tax which it recognized as a direct tax, it has never been applied to any objects but real estate and slaves. The latter application may be accounted for upon two grounds: 1. In some of the States slaves were regarded as real estate (1 Hurd, Slavery, 239; *Veazie Bank v. Fenno*, 8 Wall. 533); and, 2. Such an extension of the tax lessened the burden upon the real estate where slavery existed, while the result to the national treasury was the same, whether the slaves were omitted or included. The wishes of the South were, therefore, allowed to prevail. We are not aware that the question of the validity of such a tax was ever presented for adjudication. Slavery having passed away, it cannot hereafter arise. It does not appear that any tax like the one here in question was ever regarded or treated by Congress as a direct tax. This uniform practical construction of the Constitution touching so important a point, through so long a period, by the legislative and executive departments of the government, though not conclusive, is a consideration of great weight.

There are four adjudications by this court to be considered. They have an important, if not a conclusive, application to the case in hand. . . . [Here comes a consideration of the cases of *Hylton v. U. S.*, 3 Dall. 171; *Pac. Ins. Co. v. Soule*, 7 Wall. 433; *Veazie Bk. v. Fenno*, 8 Wall. 533; and *Scholey v. Rew*, 23 Wall. 331.]

All these cases are undistinguishable in principle from the case now before us, and they are decisive against the plaintiff in error.

The question, what is a direct tax, is one exclusively in American jurisprudence. The text-writers of the country are in entire accord upon the subject. Mr. Justice Story says all taxes are usually divided into two classes. — those which are direct and those which are indirect, — and that “under the former denomination are included taxes on land or real property, and, under the latter, taxes on consumption.” 1 Const. sect. 950.

Chancellor Kent, speaking of the case of *Hylton v. United States*, says: “The better opinion seemed to be that the direct taxes contemplated by the Constitution were only two; viz., a capitation or poll tax and a tax on land.” 1 Com. 257. See also Cooley, Taxation, p. 5, note 2; Pomeroy, Const. Law, 157; Sharswood’s Blackstone, 308, note; Rawle, Const. 30; Sergeant, Const. 305. We are not aware that any writer, since *Hylton v. United States* was decided, has expressed a view of the subject different from that of these authors.

Our conclusions are, that direct taxes, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate; and that the tax of which the plaintiff in error complains is within the category of an excise or duty. Pomeroy, Const. Law, 177; *Pacific Insurance Co. v. Soule*, and *Scholey v. Rew*, *supra*. Against the considerations, in one scale, in favor of these propositions, what has been placed in the other, as a counterpoise? Our answer is, certainly nothing of such weight, in our judg-

ment, as to require any special reply. The numerous citations from the writings of foreign political economists, made by the plaintiff in error, are sufficiently answered by Hamilton in his brief, before referred to.

*Judgment affirmed.*¹

¹ See *U. S. v. La.* 123 U. S. 32 (1887).

"The phrase 'direct taxation' appears to have been introduced in the Convention of 1787 by Gouverneur Morris, on July 12,¹ when he made the motion, which was carried, 'that direct taxation ought to be proportioned to representation.' The convention, perhaps, had no clear opinion as to the precise meaning of the words here used;² but it is plain that Morris had in mind some well-marked distinction between direct and indirect taxes. He had proposed at first simply that 'taxation shall be in proportion to representation.' To this it was objected that, although just, this plan might be embarrassing and 'might drive the legislature to the plan of requisitions;' and Morris thereupon, admitting that objections were possible, 'supposed they would be removed by restraining the rule to direct taxation. With regard to indirect taxes on exports and imports and on consumption, the rule would be inapplicable.' Wilson also saw no way of carrying Morris's plan into execution, 'unless restrained to direct taxation;' and Morris then modified his motion, with the result that the phrase 'direct taxes' passed into the Constitution.³ It is clear that in Morris's understanding, and in Wilson's as well, none but direct taxes could be levied by an apportionment among the States, the others named requiring to be laid by a general rate.

"From what source, then, did Morris and Wilson derive this classification, which set down as direct certain taxes having this convenient characteristic of being readily apportioned among the States? The answer to this question is, no doubt, to be found in Hamilton's suggestion that the writings of the French economists of the eighteenth century were the source.⁴ The doctrine that agriculture is the only productive employment, and that the net product from land, to be found in the hands of the land-owner, is the only fund from which taxation can draw without impoverishing society, led them to class taxes habitually as direct, when laid immediately upon the land-owner, and as indirect, when laid upon somebody else, but in their opinion destined to be borne by the land-owner ultimately. This distinction between direct and indirect taxation, resting upon the supposed method of incidence upon a single class of persons, is fully developed and used by Quesnay, Mercier de la Rivière, Dupont de Nemours, and Turgot. It was a necessary result of their reasoning, became familiar in all the discussions of the school in France, and, we can hardly doubt, was carried to the knowledge of readers in political science in other countries, during the short-lived pre-eminence of the Physiocrats.⁵ As for the kinds of taxes to be classed as direct, there was not complete agreement. Necessarily, taxes upon land or its returns were set down as direct taxes, and so too, taxes upon commodities, or consumption, were called indirect. Taxes upon persons, however, do not appear to be regarded by Quesnay, Dupont de Nemours, or Mercier de la Rivière as direct. The writer last-named,

¹ The use of the same expression in what purports to be the draft of a Constitution offered by Mr. Pinckney, May 29, need not be considered, in view of the plainly garbled text of that document. Elliot, Debates, v. 130, 578.

² Thus, on August 20, when the report of the Committee of Detail was under discussion, "Mr. King asked what was the precise meaning of direct taxation. No one answered." Madison's Debates, in Elliot, v. 451.

³ Elliot, v. 302.

⁴ See his brief as counsel for the United States in the Carriage Tax case, *Hylton v. United States*, Hamilton's Works, vii. 845.

⁵ Adam Smith did not adopt their use of direct and indirect, because he rejected the reasoning on which it rested; and he does not appear to have formally classified taxes under these heads upon any other principle, although he occasionally uses the terms "direct," "directly," and their opposites, with a near approach to their modern use.

after saying that the fund for taxation is in the hands of the land-owner, and that to draw from it otherwise than directly is a subversion of the natural order of society, lays down the principle that 'la forme de l'impôt est indirecte lorsqu'il est établi ou sur les personnes-mêmes ou sur les choses commerciabiles.'¹ In Turgot's writings, however, we find taxes upon persons occasionally classed as direct. Thus, in his 'Plan d'un Mémoire sur les Impositions,'² he says of the forms of taxation:—

"Il n'y en a que trois possibles:—

"La directe sur les fonds.

"La directe sur les personnes, qui devient un impôt sur l'exploitation.

"L'imposition indirecte, ou sur les consommations."

"And in the fragment which we have of his 'Comparaison de l'Impôt sur le Revenu des Propriétaires et de l'Impôt sur les Consommations,'³ a memoir prepared for the use of Franklin, a careful analysis of the same purport is made, although the point of formal classification is not reached. Of all writers upon economics in 1787,⁴ Turgot was perhaps the one most likely to have the ear of American readers; and, of Americans, Gouverneur Morris and James Wilson were as likely as any to give him their attention. The former had already formed that familiar acquaintance with French literature and politics which made his singular career in Paris possible a few years later, and Wilson had been from 1779 to 1783 accredited as advocate general of the French nation in the United States. There was, then, an easy and a probable French source for the meaning which they both attached to the phrase introduced by Morris.

"It is to be observed, also, that there were some well-known precedents for levying by apportionment such taxes as those which Morris and Wilson probably had in mind. The French *taille réelle*, a tax on the income of real property, was laid by apportioning a fixed sum among the provinces and requiring from each its quota, as has been the practice in levying its substitute, the *impôt foncier*, ever since 1790. The *capitation* was also levied in France, before the Revolution, in the same manner. The English land tax, established under William III., had for ninety years presented an example of apportionment among counties and other subdivisions, leaving the rate for each locality to be settled at the point necessary to give the due quota. Other contemporary examples could easily be cited, but these are enough for the present purpose, being necessarily familiar in this country in 1787, and likely to have a strong influence.⁵

"The meaning of the phrase 'direct taxation,' as to which Rufus King vainly sought for light, was judicially considered in the well-known Carriage Tax case, *Hylton v. United States*, in 1796. The case had been heard in the Circuit Court by Wilson, who was then one of the associate justices of the Supreme Court; and, when his judgment in the lower court was affirmed by the full bench, he contented himself with a bare statement of assent, so that we lose what would have been the most interesting and perhaps the most important opinion of all. The judgment of the court, declaring that a tax upon carriages is not a direct tax within the meaning of the Constitution, was supported by considerations which showed a strong disposition to limit the definition of direct taxes so as to include only capitation and land taxes. Mr. Justice Paterson, indeed, suggested personal property by general valuation as a possible additional

¹ L'Ordre Naturel des Sociétés Politiques, in Daire's Physiocrates, 474. For Quesnay's use of the terms in question, see Daire, i. 83, 127; and for Dupont de Nemours' *Ibid.*, ii. 354-358.

² Daire, i. 394; and see also 396.

³ Daire, i. 409.

⁴ Dupont de Nemours published his *Mémoires sur la Vie et les Ouvrages de M. Turgot* (16mo, 2 parts, pp. 156 and 216), in Philadelphia and Paris, in 1782, the year after Turgot's death. See Hildeburn, *Issues of the Press in Pennsylvania*.

⁵ For the *taille* and *capitation*, see Pizard, *La France en 1789*, 257; De Parieu, *Traité de l'Impôt*, i. 224, 153. The Act of 1763 apportioning the English land tax is given in full in Ruffhead's *Statutes at Large*, ix. 78. The text of the Acts of William III. is found in the *Rolls* edition of the *Statutes*. See also Dowell, *History of Taxation and Taxes in England*, iii. 94-97.

STATE TONNAGE TAX CASES.

SUPREME COURT OF THE UNITED STATES. 1870.

[12 Wall. 204.]

ERROR to the Supreme Court of Alabama.

These were two cases, which, though coming in different forms, involved one and the same point only; and at the bar — where the counsel directed attention to the principle involved, separated from the accidents of the case — were discussed together as presenting “precisely the same question.” The matter was thus: —

The Constitution ordains that “no State shall without the consent of Congress lay any duty of tonnage.” With this provision in force as superior law, the State of Alabama passed, on the 22d of February, 1866, a revenue law. By this law, the rate of taxation for property generally was the one half of one per cent; but “on all steamboats, vessels, and other water crafts plying in the navigable waters of the State,” the Act levied a tax at “the rate of \$1 per ton of the registered tonnage thereof,” which it declared should “be assessed and collected at the port where such vessels are registered, if practicable; otherwise at any other port or landing within the State where such vessel may be.”

The tax collector was directed by the Act to demand, in each year, of the person in charge of the vessel, if the taxes had been paid. If a

subject of direct taxation, the practicability of apportionment having already been accepted as a test of the proper meaning of the term; but he thought the question difficult, and added that he never entertained a doubt that the principal — he would not say the only — objects contemplated by the framers of the Constitution were a capitation tax and a tax on land. Wolcott, in his report upon ‘Direct Taxes,’ in December, 1796,¹ took no notice of the decision by the Supreme Court a few months before, but, for reasons of expediency, concluded that the objects of direct taxation should be limited to lands, houses, and slaves; and they accordingly were thus limited by Congress in the Acts of 1798, under which the first direct tax was levied. When the question came before the Supreme Court again in the case of *Veazie Bank v. Fenno*, 8 Wall. 533, Chief Justice Chase referred, with some doubt, to Paterson’s suggestion as to a tax on personal property by general valuation, but remarked that, in the practical construction of the Constitution by Congress, direct taxes had been limited to land and capitation taxes, and that this construction was entitled to great consideration in the absence of anything adverse to it in the discussions of the Federal Convention or of the State conventions which ratified the Constitution. Finally, when the whole subject was reviewed in the case of *Springer v. United States*, Mr. Justice Swayne, giving the opinion of the court, declared it to be their conclusion ‘that direct taxes, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate.’ The judicial interpretation of the phrase, ‘direct taxes,’ is well settled, therefore, and in close accordance with the usage found in the writings of the French economists of the last century.” — *The Direct Tax of 1861*, by Professor Charles F. Dunbar, 3 Quart. Journ. Econ. 436 (1889). See also 1 Story, Const. U. S. s. 642. — Ed.

¹ State Papers on Finance, i. 414.

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receipt for the same was not produced, he was to immediately assess the same according to tonnage, and if such tax was not paid on demand he was to seize the boat, &c., and, after notice, proceed and sell the same for payment of the tax, &c., and pay the surplus into the county treasury for the use of the owner. If the vessel could not be seized, the collector was to make the amount of the tax out of the real and personal estate of the owner, &c.

Under this Act, one Lott, tax collector of the State of Alabama, demanded of Cox, the owner of the "Dorrance," a steamer of 321 tons, and valued at \$5,000, and of several other steamers, certain sums as taxes; and under an Act of 1867, identical in language with the one of 1866, just quoted, demanded from the Trade Company of Mobile certain sums on like vessels owned by them; the tax in all the cases being proportioned to the registered tonnage of the vessel.

The steamboats, the subject of the tax, were owned exclusively by citizens of the State of Alabama, and were engaged in the navigation of the Alabama, Bigbee, and Mobile rivers, carrying freight and passengers between Mobile and other points of said rivers, altogether within the limits of that State. These waters were navigable from the sea for vessels of "ten and more tons' burden;" and it was not denied that there were ports of delivery on them above the highest points to which these boats plied. The owners of the boats were not assessed for any other tax on them than the one here claimed. The boats were enrolled and licensed for the coasting trade. Though running, therefore, between points altogether within the limits of the State of Alabama, the boats were, as it seemed (see Act of July 18th, 1866, § 28, 14 Stat. at Large, 185), of that sort on which Congress lays a tonnage duty.

Cox, under compulsion and protest, paid the tax demanded of him, and then brought *assumpsit* in one of the inferior State courts of Alabama, to get back the money. The Trade Company refused to pay, and filed a bill in a like court, to enjoin the collector from proceeding to collect. The ground of resistance to the tax in each case was this, that being laid in proportion to the tonnage of the vessel, the tax was laid in a form and manner which the State was prohibited by the already quoted section of the Constitution from adopting. The right of the State to lay a tax on vessels according to their value and as property was not denied, but on the contrary conceded.¹ Judgment being given in each case against the validity of the tax, the matter was taken to the Supreme Court of Alabama, which decided that it was lawful. To review that judgment the case was now here.

¹ It is barely necessary to note that an additional ground of defence to the tax was taken, in the fact that by the Act of Congress admitting Alabama into the Union, it is declared, "that all navigable waters within the said State shall forever remain public highways, free to the citizens of said State, and of the United States, without any tax, duty, impost, or toll therefor, imposed by the said State." This ground not being passed upon by this court, need not be adverted to further.

Messrs. J. A. Campbell and P. Hamilton, for the plaintiffs in error.
Mr. P. Phillips, contra.

MR. JUSTICE CLIFFORD delivered the judgment of the court, giving an opinion in each of the cases.

I. IN THE FIRST CASE. — . . . Congress has prescribed the rules of admeasurement and computation for estimating the tonnage of American ships and vessels. 13 Stat. at Large, 70; Id. 444.

Viewed in the light of those enactments, the word tonnage, as applied to American ships and vessels, must be held to mean their entire internal cubical capacity, or contents of the ship or vessel expressed in tons of one hundred cubical feet each, as estimated and ascertained by those rules of admeasurement and of computation. *Alexander v. Railroad*, 3 Strobbart, 598. . . .

Taxes levied by a State upon ships and vessels owned by the citizens of the State as property, based on a valuation of the same as property, are not within the prohibition of the Constitution, but it is equally clear and undeniable that taxes levied by a State upon ships and vessels as instruments of commerce and navigation are within that clause of the instrument which prohibits the States from levying any duty of tonnage, without the consent of Congress; and it makes no difference whether the ships or vessels taxed belong to the citizens of the State which levies the tax or the citizens of another State, as the prohibition is general, withdrawing altogether from the States the power to lay any duty of tonnage under any circumstances, without the consent of Congress. *Gibbons v. Ogden*, 9 Wheaton, 202; *Sinnot v. Davenport*, 22 Howard, 238; *Foster v. Davenport*, Id. 245; *Perry v. Torrence*, 8 Ohio, 524.

Annual taxes upon property in ships and vessels are continually laid, and their validity was never doubted or called in question, but if the States, without the consent of Congress, tax ships or vessels as instruments of commerce, by a tonnage duty, or indirectly by imposing the tax upon the master or crew, they assume a jurisdiction which they do not possess, as every such act falls directly within the prohibition of the Constitution. *Passenger Cases*, 7 Howard, 447, 481. . . .

Tonnage duties are as much taxes as duties on imports or exports, and the prohibition of the Constitution extends as fully to such duties if levied by the States as to duties on imports or exports, and for reasons quite as strong as those which induced the framers of the Constitution to withdraw imports and exports from State taxation. Measures, however, scarcely distinguishable from each other may flow from distinct grants of power, as, for example, Congress does not possess the power to regulate the purely internal commerce of the States, but Congress may enroll and license ships and vessels to sail from one port to another in the same State; and it is clear that such ships and vessels are deemed ships and vessels of the United States, and that as such they are entitled to the privileges of ships and vessels em-

ployed in the coasting trade. 1 Stat. at Large, 287; Id. 305; 3 Kent (11th ed.), 203. . . .

Steamboats, as well as sailing ships and vessels, are required to be enrolled and licensed for the coasting trade, and the record shows that all the steamboats taxed in this case had conformed to all the regulations of Congress in that regard, that they were duly enrolled and licensed for the coasting trade and were engaged in the transportation of passengers and freight within the limits of the State, upon waters navigable from the sea by vessels of ten or more tons burden.

Tonnage duties, to a greater or less extent, have been imposed by Congress ever since the Federal government was organized under the Constitution to the present time. They have usually been exacted when the ship or vessel entered the port, and have been collected in a manner not substantially different from that prescribed in the Act of the State Legislature under consideration. Undisputed authority exists in Congress to impose such duties, and it is not pretended that any consent has ever been given by Congress to the State to exercise any such power. If the tax levied is a duty of tonnage, it is conceded that it is illegal, and it is difficult to see how the concession could be avoided, as the prohibition is express, but the attempt is made to show that the legislature, in enacting the law imposing the tax, merely referred to the registered tonnage of the steamboats "as a way or mode to determine and ascertain the tax to be assessed on the steamboats, and to furnish a rule or rate to govern the assessors in the performance of their duties." Suppose that could be admitted, it would not have much tendency to strengthen the argument for the defendant, as the suggestion concedes what is obvious from the schedule, that the taxes are levied without any regard to the value of the steamboats. But the proposition involved in the suggestion cannot be admitted, as, by the very terms of the Act, the tax is levied on the steamboats wholly irrespective of the value of the vessels as property, and solely and exclusively on the basis of their cubical contents as ascertained by the rules of admeasurement and computation prescribed by the Act of Congress.

By the terms of the law the taxation prescribed is "at the rate of one dollar per ton of the registered tonnage thereof," and the ninetieth section of the Act provides that the tax collector must, each year, demand of the person in charge of the steamboat whether the taxes have been paid, and if the person in charge fails to produce a receipt therefor by a tax collector, authorized to collect such taxes, the collector having the list must at once proceed to assess the same, and if the tax is not paid on demand he must seize such steamboat, &c., and after twenty days' notice, as therein prescribed, shall sell the same, or so much thereof as will pay the taxes and expenses for keeping and costs. Sess. Acts, 1866, pp. 7, 31.

Legislative enactments, where the language is unambiguous, cannot be changed by construction, nor can the language be divested of its plain and obvious meaning. Taxes levied under an enactment which

directs that a tax shall be imposed on steamboats at the rate of one dollar per ton of the registered tonnage thereof, and that the same shall be assessed and collected at the port where such steamboats are registered, cannot, in the judgment of this court, be held to be a tax on the steamboat as property. On the contrary, the tax is just what the language imports, a duty of tonnage, which is made even plainer when it comes to be considered that the steamboats are not to be taxed at all unless they are "plying in the navigable waters of the State," showing to a demonstration that it is as instruments of commerce and not as property that they are required to contribute to the revenues of the State.

Such a provision is much more clearly within the prohibition in question than the one involved in a recent case decided by this court, in which it was held that a statute of a State enacting that the wardens of a port were entitled to demand and receive, in addition to other fees, the sum of five dollars for every vessel arriving at the port, whether called on to perform any service or not, was both a regulation of commerce and a duty of tonnage, and that as such it was unconstitutional and void. *Steamship Co. v. Port Wardens*, 6 Wallace, 34.

Speaking of the same prohibition, the Chief Justice said in that case that those words in their most obvious and general sense describe a duty proportioned to the tonnage of the vessel — a certain rate on each ton — which is exactly what is directed by the provision in the Tax Act before the court, but he added that it seems plain, if the Constitution be taken in that restricted sense, it would not fully accomplish the intent of the framers, as the prohibition upon the States against levying duties on imports or exports would be ineffectual if it did not also extend to duties on the ships which serve as the vehicles of conveyance, which was doubtless intended by the prohibition of any duty of tonnage. "It was not only a *pro rata* tax which was prohibited, but any duty on the ship, whether a fixed sum upon its whole tonnage, or a sum to be ascertained by comparing the amount of tonnage with the rate of duty." Assume the rule to be as there laid down, and all must agree that "the levy of the tax in question is expressly prohibited, as the schedule shows that it is exactly proportioned to the registered tonnage of the steamboats plying in the navigable waters of the State." . . .

Taxes in aid of the inspection laws of a State, under special circumstances, have been upheld as necessary to promote the interests of commerce and the security of navigation. *Cooley v. Port Wardens*, 12 Howard, 314. Laws of that character are upheld as contemplating benefits and advantages to commerce and navigation, and as altogether distinct from imposts and duties on imports and exports and duties of tonnage. Usage, it is said, has sanctioned such laws where Congress has not legislated, but it is clear that such laws bear no relation to the Act in question, as the Act under consideration is emphatically an Act to raise revenue to replenish the treasury of the State and for no other

purpose, . . . without any corresponding or equivalent benefit or advantage to the vessels taxed or to the ship-owners, and consequently it cannot be upheld by virtue of the rules applied in the construction of laws regulating pilot dues and port charges. *State v. Charleston*, 4 Rich. S. C. 286; *Benedict v. Vanderbilt*, 1 Robt. N. Y. 200.

Attempt was made in the case of *Alexander v. Railroad* [3 Strob. 598], to show that the form of levying the tax was simply a mode of assessing the vessels as property, but the argument did not prevail, nor can it in this case, as the amount of the tax is measured by the tonnage of the steamboats and not by their value as property.

Reference is made to the case of the *Towboat Company v. Bordon*, 7 Louisiana An. 195, as asserting the opposite rule, but the court is of a different opinion, as the tax in that case was levied, not upon the boat, but upon the capital of the company owning the boat, and the court in delivering their opinion say the capital of the company is property, and the Constitution of the State requires an equal and uniform tax to be imposed upon it with the other property of the State for the support of government.

For these reasons the court is of opinion that the State law levying the taxes in this case is unconstitutional and void, that the judgment of the State Court is erroneous and that it must be reversed, and having come to that conclusion, the court does not find it necessary to determine the other question.

Judgment reversed with costs, and the cause remanded for further proceedings in conformity to the opinion of the court.

II. IN THE SECOND CASE. — . . . The court is of the opinion that the tax in this case is a duty of tonnage, and that the law imposing it is plainly unconstitutional and void. Taxes, as the law provides, must be assessed by the assessor in each county on and from the following subjects and at the following rates, to wit: "On all steamboats, &c., plying in the navigable waters of the State, at the rate of one dollar per ton of the registered tonnage thereof," which must be assessed and collected at the port where such steamboats are registered, &c. Revised Code, 169. Copied as the provision is from the enactment of the previous year, it is obvious that it must receive the same construction, and as the tax is one dollar per ton, it is too plain for argument that the amount of the tax depends upon the carrying capacity of the steamboat and not upon her value as property, as the experience of every one shows that a small steamer, new and well built, may be of much greater value than a large one, badly built or in need of extensive repairs. Separate lists are made for the county and school taxes, but the two combined amount exactly to one dollar per ton, as in the levy for the State tax, and the court is of the opinion that the case falls within the same rule as the case just decided.

Evidently the word tonnage in commercial designation means the number of tons burden the ship or vessel will carry, as estimated and ascertained by the official admeasurement and computation prescribed

by the public authority. Regulations upon the subject are enacted by Parliament in the parent country and by Congress in this country, as appears by several Acts of Congress. 1 Stat. at Large, 305; 13 Id. 444. Tonnage, says a writer of experience, has long been an official term intended originally to express the burden that a ship would carry, in order that the various dues and customs which are levied upon shipping might be levied according to the size of the vessel, or rather in proportion to her capability of carrying burden. Hence the term, as applied to a ship, has become almost synonymous with that of size. Homan's Com. and Nav., Tonnage. Apply that interpretation to the word tonnage as used in the Tax Act under consideration, and it is as clear as anything can be in legislation that the tax imposed by that provision is a tonnage tax, or duty of tonnage, as the phrase is in the Constitution.

State authority to tax ships and vessels, it is supposed by the respondent, extends to all cases where the ship or vessel is not employed in foreign commerce or in commerce between ports or places in different States. He concedes that the States cannot levy a duty of tonnage on ships or vessels if the ship or vessel is employed in foreign commerce or in commerce "among the States," but he denies that the prohibition extends to ships or vessels employed in commerce between ports and places in the same State, and that is the leading error in the opinion of the Supreme Court of the State. Founded upon that mistake the proposition is that all taxes are taxes on property, although levied on ships and vessels duly enrolled and licensed, if the ship or vessel is not employed in foreign commerce or in commerce among the States.

Ships or vessels of ten or more tons burden, duly enrolled and licensed, if engaged in commerce on waters which are navigable by such vessels from the sea, are ships and vessels of the United States entitled to the privileges secured to such vessels by the Act for enrolling or licensing ships or vessels to be employed in the coasting trade. 1 Stat. at Large, 205; Id. 287.

Such a rule as that assumed by the respondent would incorporate into the Constitution an exception which it does not contain. Had the prohibition in terms applied only to ships and vessels employed in foreign commerce or in commerce among the States, his construction would be right, but courts of justice cannot add any new provision to the fundamental law, and, if not, it seems clear to a demonstration that the construction assumed by the respondent is erroneous.

*Decree reversed, and the cause remanded for further proceedings in conformity to the opinion of this court.*¹

¹ In *Peete v. Morgan*, 19 Wall. 581 (1873) a statute of Texas of 1870 required every vessel arriving at the quarantine station of any town on the coast of the State to pay \$5 for the first hundred tons and one and a half cents for each additional ton. Assuming this to be intended to defray the expenses of quarantine regulations, the court (DAVIS, J.) held it to be unconstitutional.

In *Huse v. Glover*, 119 U. S. 543, 549 (1886), the question was as to the right of

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VEAZIE BANK v. FENNO.

SUPREME COURT OF THE UNITED STATES. 1869.

[8 Wall. 533.]

On certificate of division for the Circuit Court for Maine.

The Constitution ordains that: "The Congress shall have power—

"To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States.

"To regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

"To coin money, regulate the value thereof, and of foreign coin."

It also ordains that:

"Direct taxes shall be apportioned among the several States . . . according to their respective numbers."

"No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be made."

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

With these provisions in force as fundamental law, Congress passed, July 13th, 1866, 14 Stat. at Large, 146, an Act, the second clause of the 9th section of which enacts:

"That every (national banking association,) State bank, or State banking association, shall pay a tax of ten per centum on the amount of notes of any person, State bank, or State banking association, used for circulation and paid out by them after the 1st day of August, 1866, and such tax shall be assessed and paid in such manner as shall be prescribed by the commissioner of internal revenue." Under this

Illinois to collect tolls on vessels passing through the improved waterway of the Illinois River. In upholding this, the court (FIELD, J.) said: "Nor is there anything in the objection that the rates of toll are prescribed by the commissioners according to the tonnage of the vessels, and the amount of freight carried by them through the locks. This is simply a mode of fixing the rate according to the size of the vessel and the amount of property it carries, and in no sense is a duty of tonnage within the prohibition of the Constitution. A duty of tonnage within the meaning of the Constitution is a charge upon a vessel, according to its tonnage, as an instrument of commerce, for entering or leaving a port, or navigating the public waters of the country; and the prohibition was designed to prevent the States from imposing hindrances of this kind to commerce carried on by vessels."

Compare Cannon v. N. O., 20 Wall. 577; Packet Co. v. Keokuk, 95 U. S. 80; Transp. Co. v. Wheeling, 99 U. S. 273; Packet Co. v. St. Louis, 100 U. S. 423; Wiggins Ferry Co. v. East St. Louis, 107 U. S. 365; Transp. Co. v. Parkersburg, 107 U. S. 691.—Ed.

The subject of the taxation was not the franchise
the bank did property created under that franchise
particular tax bears heavily upon a corp. or a class

Act a tax of ten per cent was assessed upon the Veazie Bank, for its bank notes issued for circulation, after the day named in the Act. The Veazie Bank was a corporation chartered by the State of Maine, with authority to issue bank notes for circulation, and the notes on which the tax imposed by the Act was collected, were issued under this authority. There was nothing in the case showing that the bank sustained any relation to the State as a financial agent, or that its authority to issue notes was conferred or exercised with any special reference to other than private interests.

The bank declined to pay the tax, alleging it to be unconstitutional, and the collector of internal revenue, one Fenno, was proceeding to make a distraint in order to collect it, with penalty and costs, when, in order to prevent this, the bank paid it under protest. An unsuccessful claim having been made on the commissioner of internal revenue for reimbursement, suit was brought by the bank against the collector, in the court below.

The case was presented to that court upon an agreed statement of facts, and, upon a prayer for instructions to the jury, the judges found themselves opposed in opinion on three questions, the first of which — the two others differing from it in form only, and not needing to be recited — was this: “Whether the second clause of the 9th section of the Act of Congress of the 13th of July, 1866, under which the tax in this case was levied and collected, is a valid and constitutional law.”

Reverdy Johnson and *Caleb Cushing*, for the plaintiffs. *E. R. Hoar*, Attorney-General of the United States, for the defendant.

The CHIEF JUSTICE delivered the opinion of the court.

The necessity of adequate provision for the financial exigencies created by the late rebellion, suggested to the administrative and legislative departments of the government important changes in the systems of currency and taxation which had hitherto prevailed. These changes, more or less distinctly shown in administrative recommendations, took form and substance in legislative Acts. We have now to consider, within a limited range, those which relate to circulating notes and the taxation of circulation.

At the beginning of the rebellion the circulating medium consisted almost entirely of bank notes issued by numerous independent corporations variously organized under State legislation, of various degrees of credit, and very unequal resources, administered often with great, and not unfrequently, with little skill, prudence, and integrity. The Acts of Congress, then in force, prohibiting the receipt or disbursement, in the transactions of the national government, of anything except gold and silver, and the laws of the States requiring the redemption of bank notes in coin on demand, prevented the disappearance of gold and silver from circulation. There was, then, no national currency except coin; there was no general (see the Act of December 27th, 1854, to suppress small notes in the District of Columbia, 10 Stat. at Large, 599) regulation of any other by national legislation;

legitimate for Congress to tax in order to carry out its method of regulating the currency. It can't prescribe limits in favor of Congress.

and no national taxation was imposed in any form on the State bank circulation.

The first Act authorizing the emission of notes by the Treasury Department for circulation was that of July 17th, 1861. 12 Stat. at Large, 259. The notes issued under this Act were treasury notes, payable on demand in coin. The amount authorized by it was \$50,000,000, and was increased by the Act of February 12th, 1862 (Id. 338), to \$60,000,000.

On the 31st of December, 1861, the State banks suspended specie payment. Until this time the expenses of the war had been paid in coin, or in the demand notes just referred to; and for some time afterwards, they continued to be paid in these notes, which, if not redeemed in coin, were received as coin in the payment of duties.

Subsequently, on the 25th of February, 1862 (Id. 345), a new policy became necessary in consequence of the suspension and of the condition of the country, and was adopted. The notes hitherto issued, as has just been stated, were called treasury notes, and were payable on demand in coin. The Act now passed authorized the issue of bills for circulation under the name of United States notes, made payable to bearer, but not expressed to be payable on demand, to the amount of \$150,000,000; and this amount was increased by subsequent Acts to \$450,000,000, of which \$50,000,000 were to be held in reserve, and only to be issued for a special purpose, and under special directions as to their withdrawal from circulation. Act of July 11th, 1862, Id. 532; Act of March 3d, 1863, Id. 710. These notes, until after the close of the war, were always convertible into, or receivable at par for bonds payable in coin, and bearing coin interest, at a rate not less than five per cent, and the Acts by which they were authorized, declared them to be lawful money and a legal tender. This currency, issued directly by the government for the disbursement of the war and other expenditures, could not, obviously, be a proper object of taxation.

But on the 25th of February, 1863, the Act authorizing national banking associations (Act of March 3d, 1863, 12 Stat. at Large, 670) was passed, in which, for the first time during many years, Congress recognized the expediency and duty of imposing a tax upon currency. By this Act a tax of two per cent annually was imposed on the circulation of the associations authorized by it. Soon after, by the Act of March 3d, 1863 (Id. 712), a similar but lighter tax of one per cent annually was imposed on the circulation of State banks in certain proportions to their capital, and of two per cent on the excess; and the tax on the national associations was reduced to the same rates.

Both Acts also imposed taxes on capital and deposits, which need not be noticed here.

At a later date, by the Act of June 3d, 1864 (13 Id. 111), which was substituted for the Act of February 25th, 1863, authorizing national banking associations, the rate of tax on circulation was continued and applied to the whole amount of it, and the shares of their

stockholders were also subjected to taxation by the States; and a few days afterwards, by the Act of June 30th, 1864 (Id. 277), to provide ways and means for the support of the government, the tax on the circulation of the State banks was also continued at the same annual rate of one per cent, as before, but payment was required in monthly instalments of one-twelfth of one per cent, with monthly reports from each State bank of the amount in circulation.

It can hardly be doubted that the object of this provision was to inform the proper authorities of the exact amount of paper money in circulation, with a view to its regulation by law.

The first step taken by Congress in that direction was by the Act of July 17, 1862 (Act of March 3d, 1863, 12 Stat. at Large, 592), prohibiting the issue and circulation of notes under one dollar by any person or corporation. The Act just referred to was the next, and it was followed some months later by the Act of March 3d, 1865, amendatory of the prior internal revenue Acts, the sixth section of which provides, "that every national banking association, State bank, or State banking association, shall pay a tax of ten per centum on the amount of the notes of any State bank, or State banking association, paid out by them after the 1st day of July, 1866." 13 Id. 484.

The same provision was re-enacted, with a more extended application, on the 13th of July, 1866, in these words: "Every national banking association, State bank, or State banking association, shall pay a tax of ten per centum on the amount of notes of any person, State bank, or State banking association used for circulation, and paid out by them after the first day of August, 1866, and such tax shall be assessed and paid in such manner as shall be prescribed by the commissioner of internal revenue." 14 Id. 146.

The constitutionality of this last provision is now drawn in question, and this brief statement of the recent legislation of Congress has been made for the purpose of placing in a clear light its scope and bearing, especially as developed in the provisions just cited. It will be seen that when the policy of taxing bank circulation was first adopted in 1863, Congress was inclined to discriminate for, rather than against, the circulation of the State banks; but that when the country had been sufficiently furnished with a national currency by the issues of United States notes and of national bank notes, the discrimination was turned, and very decidedly turned, in the opposite direction.

The general question now before us is, whether or not the tax of ten per cent, imposed on State banks or national banks paying out the notes of individuals or State banks used for circulation, is repugnant to the Constitution of the United States.

In support of the position that the Act of Congress, so far as it provides for the levy and collection of this tax, is repugnant to the Constitution, two propositions have been argued with much force and earnestness. The first is that the tax in question is a direct tax, and has not been apportioned among the States agreeably to the Constitu-

tion. The second is that the Act imposing the tax impairs a franchise granted by the State, and that Congress has no power to pass any law with that intent or effect.

The first of these propositions will be first examined. . . .

It may be safely assumed, therefore, as the unanimous judgment of the court, that a tax on carriages is not a direct tax. And it may further be taken as established upon the testimony of Paterson, that the words direct taxes, as used in the Constitution, comprehended only capitation taxes, and taxes on land, and perhaps taxes on personal property by general valuation and assessment of the various descriptions possessed within the several States.

It follows necessarily that the power to tax without apportionment extends to all other objects. Taxes on other objects are included under the heads of taxes not direct, duties, imposts, and excises, and must be laid and collected by the rule of uniformity. The tax under consideration is a tax on bank circulation, and may very well be classed under the head of duties. Certainly it is not, in the sense of the Constitution, a direct tax. It may be said to come within the same category of taxation as the tax on incomes of insurance companies, which this court, at the last term, in the case of *Pacific Insurance Company v. Soule*, 7 Wall. 434, held not to be a direct tax.

Is it, then, a tax on a franchise granted by a State, which Congress, upon any principle exempting the reserved powers of the States from impairment by taxation, must be held to have no authority to lay and collect? We do not say that there may not be such a tax. It may be admitted that the reserved rights of the States, such as the right to pass laws, to give effect to laws through executive action, to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of State government, are not proper subjects of the taxing power of Congress. But it cannot be admitted that franchises granted by a State are necessarily exempt from taxation; for franchises are property, often very valuable and productive property; and when not conferred for the purpose of giving effect to some reserved power of a State, seem to be as properly objects of taxation as any other property.

But in the case before us the object of taxation is not the franchise of the bank, but property created, or contracts made and issued under the franchise, or power to issue bank bills. A railroad company, in the exercise of its corporate franchises, issues freight receipts, bills of lading, and passenger tickets; and it cannot be doubted that the organization of railroads is quite as important to the State as the organization of banks. But it will hardly be questioned that these contracts of the company are objects of taxation within the powers of Congress, and not exempted by any relation to the State which granted the charter of the railroad. And it seems difficult to distinguish the taxation of notes issued for circulation from the taxation of these railroad contracts. Both descriptions of contracts are means of profit

to the corporations which issue them; and both, as we think, may properly be made contributory to the public revenue.

It is insisted, however, that the tax in the case before us is excessive, and so excessive as to indicate a purpose on the part of Congress to destroy the franchise of the bank, and is, therefore, beyond the constitutional power of Congress.

The first answer to this is that the judicial cannot prescribe to the legislative department of the government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected. So if a particular tax bears heavily upon a corporation, or a class of corporations, it cannot, for that reason only, be pronounced contrary to the Constitution.

But there is another answer which vindicates equally the wisdom and the power of Congress.

It cannot be doubted that under the Constitution the power to provide a circulation of coin is given to Congress. And it is settled by the uniform practice of the government and by repeated decisions, that Congress may constitutionally authorize the emission of bills of credit. It is not important here, to decide whether the quality of legal tender, in payment of debts, can be constitutionally imparted to these bills; it is enough to say, that there can be no question of the power of the government to emit them; to make them receivable in payment of debts to itself; to fit them for use by those who see fit to use them in all the transactions of commerce; to provide for their redemption; to make them a currency, uniform in value and description, and convenient and useful for circulation. These powers, until recently, were only partially and occasionally exercised. Lately, however, they have been called into full activity, and Congress has undertaken to supply a currency for the entire country.

The methods adopted for the supply of this currency were briefly explained in the first part of this opinion. It now consists of coin, of United States notes, and of the notes of the national banks. Both descriptions of notes may be properly described as bills of credit, for both are furnished by the government; both are issued on the credit of the government; and the government is responsible for the redemption of both; primarily as to the first description, and immediately upon default of the bank, as to the second. When these bills shall be made convertible into coin, at the will of the holder, this currency will, perhaps, satisfy the wants of the community, in respect to a circulating medium, as perfectly as any mixed currency that can be devised.

Having thus, in the exercise of undisputed constitutional powers, undertaken to provide a currency for the whole country, it cannot be questioned that Congress may, constitutionally, secure the benefit of it to the people by appropriate legislation. To this end, Congress has denied the quality of legal tender to foreign coins, and has provided

by law against the imposition of counterfeit and base coin on the community. To the same end, Congress may restrain, by suitable enactments, the circulation as money of any notes not issued under its own authority. Without this power, indeed, its attempts to secure a sound and uniform currency for the country must be futile.

Viewed in this light, as well as in the other light of a duty on contracts or property, we cannot doubt the constitutionality of the tax under consideration. The three questions certified from the Circuit Court of the District of Maine must, therefore, be answered

*Affirmatively.*¹

[NELSON, J., for himself and DAVIS, J., gave a dissenting opinion.]

State Maryland tax

branch of the U. S. bank,

State notes, M'CULLOCH v. THE STATE OF MARYLAND.

no right to SUPREME COURT OF THE UNITED STATES. 1819.

any of the [4 Wheat. 316.]

below - [The statement of facts and the first part of the opinion are given, *supra*, 271. The rest of the opinion, beginning on p. 425 of 4 Wheaton's Reports, here follows.]

MARSHALL, C. J. . . . 2. Whether the State of Maryland may, without violating the Constitution, tax that branch?

That the power of taxation is one of vital importance; that it is retained by the States; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments: are truths which have never been denied. But, such is the paramount character of the Constitution, that its capacity to withdraw any subject from the action of even this power, is admitted. The States are expressly forbidden to lay any duties on imports or exports, except what may be absolutely necessary for executing their inspection laws. If the obligation of this prohibition must be conceded — if it may restrain a State from the exercise of its taxing power on imports and exports; the same paramount character would seem to restrain, as it certainly may restrain, a State from such other exercise of this power, as is in its nature incompatible with, and repugnant to, the constitutional laws of the Union. A law, absolutely re-

1 Affirmed in *Nat. Bank v. U. S.*, 101 U. S. 1 (1879). In *The Head Money Cases*, 112 U. S. 580, 596 (1884), MILLER, J., for the court, said: "In the case of *Veazie Bank v. Fenno*, 8 Wall. 533, 549, the enormous tax of eight [*sic*] per cent per annum on the circulation of State banks, which was designed, and did have the effect, to drive all such circulation out of existence, was upheld because it was a means properly adopted by Congress to protect the currency which it had created, namely, the legal tender notes and the notes of the national banks. It was not subject, therefore, to the rules which would invalidate an ordinary tax, pure and simple." Compare 1 Hare, Am. Const. Law, 295, 474. — Ed.

burden any member of the Court. Laws enacted by Congress, to carry out the powers vested in the natl govt.

pugnant to another, as entirely repeals that other as if express terms of repeal were used.

On this ground the counsel for the bank place its claim to be exempted from the power of a State to tax its operations. There is no express provision for the case, but the claim has been sustained on a principle which so entirely pervades the Constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it, without rending it into shreds.

This great principle is, that the Constitution and the laws made in pursuance thereof are supreme; that they control the Constitution and laws of the respective States, and cannot be controlled by them. From this, which may be almost termed an axiom, other propositions are deduced as corollaries, on the truth or error of which, and on their application to this case, the cause has been supposed to depend. These are, 1st. That a power to create implies a power to preserve. 2d. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with, these powers to create and to preserve. 3d. That where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme.

These propositions, as abstract truths, would, perhaps, never be controverted. Their application to this case, however, has been denied; and, both in maintaining the affirmative and the negative, a splendor of eloquence, and strength of argument, seldom, if ever, surpassed, have been displayed.

The power of Congress to create, and of course to continue, the bank, was the subject of the preceding part of this opinion; and is no longer to be considered as questionable.

That the power of taxing it by the States may be exercised so as to destroy it, is too obvious to be denied. But taxation is said to be an absolute power, which acknowledges no other limits than those expressly prescribed in the Constitution, and like sovereign power of every other description, is trusted to the discretion of those who use it. But the very terms of this argument admit that the sovereignty of the State, in the article of taxation itself, is subordinate to, and may be controlled by, the Constitution of the United States. How far it has been controlled by that instrument must be a question of construction. In making this construction, no principle not declared, can be admissible, which would defeat the legitimate operations of a supreme government. It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence. This effect need not be stated in terms. It is so involved in the declaration of supremacy, so necessarily implied in it, that the expression of it could not make it more certain. We must, therefore, keep it in view while construing the Constitution.

The argument on the part of the State of Maryland, is, not that the

States may directly resist a law of Congress, but that they may exercise their acknowledged powers upon it, and that the Constitution leaves them this right in the confidence that they will not abuse it.

Before we proceed to examine this argument, and to subject it to the test of the Constitution, we must be permitted to bestow a few considerations on the nature and extent of this original right of taxation, which is acknowledged to remain with the States. It is admitted that the power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power, is found in the structure of the government itself. In imposing a tax the legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation.

The people of a State, therefore, give to their government a right of taxing themselves and their property, and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over their representative, to guard them against its abuse. But the means employed by the government of the Union have no such security, nor is the right of a State to tax them sustained by the same theory. Those means are not given by the people of a particular State, not given by the constituents of the legislature, which claim the right to tax them, but by the people of all the States. They are given by all, for the benefit of all—and upon theory, should be subjected to that government only which belongs to all.

It may be objected to this definition, that the power of taxation is not confined to the people and property of a State. It may be exercised upon every object brought within its jurisdiction.

This is true. But to what source do we trace this right? It is obvious, that it is an incident of sovereignty, and is co-extensive with that to which it is an incident. All subjects over which the sovereign power of a State extends, are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident.

The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable that it does not. Those powers are not given by the people of a single State. They are given by the people of the United States, to a government whose laws, made in pursuance of the Constitution, are declared to be supreme. Consequently, the people of a single State cannot confer a sovereignty which will extend over them.

If we measure the power of taxation residing in a State, by the extent of sovereignty which the people of a single State possess, and can con-

fer on its government, we have an intelligible standard, applicable to every case to which the power may be applied. We have a principle which leaves the power of taxing the people and property of a State unimpaired; which leaves to a State the command of all its resources, and which places beyond its reach, all those powers which are conferred by the people of the United States on the government of the Union, and all those means which are given for the purpose of carrying those powers into execution. We have a principle which is safe for the States, and safe for the Union. We are relieved, as we ought to be, from clashing sovereignty; from interfering powers; from a repugnancy between a right in one government to pull down what there is an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy what there is a right in another to preserve. We are not driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power. The attempt to use it on the means employed by the government of the Union, in pursuance of the Constitution, is itself an abuse, because it is the usurpation of a power, which the people of a single State cannot give.

We find, then, on just theory, a total failure of this original right to tax the means employed by the government of the Union, for the execution of its powers. The right never existed, and the question whether it has been surrendered, cannot arise.

But, waiving this theory for the present, let us resume the inquiry, whether this power can be exercised by the respective States, consistently with a fair construction of the Constitution?

That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied. But all inconsistencies are to be reconciled by the magic of the word "confidence." Taxation, it is said, does not necessarily and unavoidably destroy. To carry it to the excess of destruction would be an abuse, to presume which, would banish that confidence which is essential to all government.

But is this a case of confidence? Would the people of any one State trust those of another with a power to control the most insignificant operations of their State government? We know they would not. Why, then, should we suppose that the people of any one State should be willing to trust those of another with a power to control the operations of a government to which they have confided their most important and most valuable interests? In the legislature of the Union alone, are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused.

This, then, is not a case of confidence, and we must consider it as it really is.

If we apply the principle for which the State of Maryland contends, to the Constitution generally, we shall find it capable of changing totally the character of that instrument. We shall find it capable of arresting all the measures of the government, and of prostrating it at the foot of the States. The American people have declared their Constitution, and the laws made in pursuance thereof, to be supreme; but this principle would transfer the supremacy, in fact, to the States.

If the States may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the States.

Gentlemen say, they do not claim the right to extend State taxation to these objects. They limit their pretensions to property. But on what principle is this distinction made? Those who make it have furnished no reason for it, and the principle for which they contend denies it. They contend that the power of taxation has no other limit than is found in the 10th section of the 1st article of the Constitution; that, with respect to everything else, the power of the States is supreme, and admits of no control. If this be true, the distinction between property and other subjects to which the power of taxation is applicable, is merely arbitrary, and can never be sustained. This is not all. If the controlling power of the States be established; if their supremacy as to taxation be acknowledged; what is to restrain their exercising this control in any shape they may please to give it? Their sovereignty is not confined to taxation. That is not the only mode in which it might be displayed. The question is, in truth, a question of supremacy; and if the right of the States to tax the means employed by the general government be conceded, the declaration that the Constitution, and the laws made in pursuance thereof, shall be the supreme law of the land, is empty and unmeaning declamation.

In the course of the argument, the "Federalist" has been quoted; and the opinions expressed by the authors of that work have been justly supposed to be entitled to great respect in expounding the Constitution. No tribute can be paid to them which exceeds their merit; but in applying their opinions to the cases which may arise in the progress of our government, a right to judge of their correctness must be retained; and, to understand the argument, we must examine the proposition it maintains, and the objections against which it is directed. The subject of those numbers, from which passages have been cited, is the unlimited power of taxation which is vested in the general government. The objection to this unlimited power, which the argument seeks to remove,

is stated with fulness and clearness. It is "that an indefinite power of taxation in the latter (the government of the Union) might, and probably would, in time, deprive the former (the government of the States) of the means of providing for their own necessities; and would subject them entirely to the mercy of the national legislature. As the laws of the Union are to become the supreme law of the land; as it is to have power to pass all laws that may be necessary for carrying into execution the authorities with which it is proposed to vest it; the national government might at any time abolish the taxes imposed for State objects, upon the pretence of an interference with its own. It might allege a necessity for doing this, in order to give efficacy to the national revenues; and thus all the resources of taxation might, by degrees, become the subjects of Federal monopoly, to the entire exclusion and destruction of the State governments."

The objections to the Constitution which are noticed in these numbers, were to the undefined power of the government to tax, not to the incidental privilege of exempting its own measures from State taxation. The consequences apprehended from this undefined power were, that it would absorb all the objects of taxation, "to the exclusion and destruction of the State governments." The arguments of the "Federalist" are intended to prove the fallacy of these apprehensions; not to prove that the government was incapable of executing any of its powers, without exposing the means it employed to the embarrassments of State taxation. Arguments urged against these objections, and these apprehensions, are to be understood as relating to the points they mean to prove. Had the authors of those excellent essays been asked, whether they contended for that construction of the Constitution, which would place within the reach of the States those measures which the government might adopt for the execution of its powers; no man, who has read their instructive pages, will hesitate to admit, that their answer must have been in the negative.

It has also been insisted, that, as the power of taxation in the general and State governments is acknowledged to be concurrent, every argument which would sustain the right of the general government to tax banks chartered by the States, will equally sustain the right of the States to tax banks chartered by the general government.

But the two cases are not on the same reason. The people of all the States have created the general government, and have conferred upon it the general power of taxation. The people of all the States, and the States themselves, are represented in Congress, and, by their representatives, exercise this power. When they tax the chartered institutions of the States, they tax their constituents; and these taxes must be uniform. But when a State taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by people over whom they claim no control. It acts upon the measures of a government created by others as well as themselves, for the benefit of others in common with themselves. The

difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole — between the laws of a government declared to be supreme, and those of a government which, when in opposition to those laws, is not supreme.

But if the full application of this argument could be admitted, it might bring into question the right of Congress to tax the State banks, and could not prove the right of the States to tax the Bank of the United States.

The court has bestowed on this subject its most deliberate consideration. The result is a conviction that the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the Constitution has declared.

We are unanimously of opinion, that the law passed by the legislature of Maryland, imposing a tax on the Bank of the United States, is unconstitutional and void.

This opinion does not deprive the States of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the State, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the State. But this is a tax on the operations of the bank, and is, consequently, a tax on the operation of an instrument employed by the government of the Union to carry its powers into execution. Such a tax must be unconstitutional.¹

WESTON ET AL. v. THE CITY COUNCIL OF CHARLESTON.

SUPREME COURT OF THE UNITED STATES. 1829.

[2 Pet. 449.]

THIS was a writ of error to the Constitutional Court of South Carolina.

On the 20th of February, 1823, the City Council of Charleston passed "an ordinance to raise supplies for the use of the city of Charleston, for the year 1823." The ordinance provides "that the following species of property, owned and possessed within the limits of the city of Charleston, shall be subject to taxation in the manner, and at the

¹ The court, having been asked in *Osborn v. U. S. Bank*, 9 Wheat 738, 859 (1824), to allow a re-argument of this general question, did so, and thereupon affirmed the previous decision. — Ed.

rate, and conformably to the provisions hereinafter specified; that is to say, all personal estate, consisting of bonds, notes, insurance stock, six and seven per cent stock of the United States, or other obligations upon which interest has been or will be received during the year, over and above the interest which has been paid (funded stock of this State, and stock of the incorporated banks of this State and the United States Bank excepted) twenty-five cents upon every hundred dollars."

In the Court of Common Pleas for the Charleston district, the plaintiffs in error, in May, 1823, filed a suggestion for a prohibition, as owners of United States stock, against the City Council of Charleston, to restrain them from levying under the ordinances, on six and seven per cent stock of the United States and the tax imposed under the ordinance; on the ground that the ordinance, so far as it imposes a tax on the stock of the United States, is contrary to the Constitution of the United States.

The prohibition having been granted, the City Council applied to the Constitutional Court, the highest court of law in the State, to reverse the order, on the ground that the ordinance was not repugnant to the Constitution of the United States; and the proceedings in the case having been removed to the said court, the said court in May Term, 1823, by a majority of their judges (four being in favor of the constitutionality of the ordinance, and three against it), decided that the said ordinance did not violate the Constitution of the United States, in imposing a tax upon the holders of United States stock. From this decision the relators appealed by writ of error to the Supreme Court of the United States. The error assigned in this court was: that the judgment of the Constitutional Court was erroneous, in that it decided the ordinance of the City Council of Charleston not to be repugnant to the Constitution of the United States.

The case was argued by Mr. Hayne, for the plaintiffs in error; and by Mr. Cruger and Mr. Legare, for the defendants.

MARSHALL, C. J. . . . This brings us to the main question. Is the stock issued for loans made to the government of the United States liable to be taxed by States and corporations?

Congress has power "to borrow money on the credit of the United States." The stock it issues is the evidence of a debt created by the exercise of this power. The tax in question is a tax upon the contract subsisting between the government and the individual. It bears directly upon that contract, while subsisting and in full force. The power operates upon the contract the instant it is framed, and must imply a right to affect that contract.

If the States and corporations throughout the Union possess the power to tax a contract for the loan of money, what shall arrest this principle in its application to every other contract? What measure can government adopt which will not be exposed to its influence?

But it is unnecessary to pursue this principle through its diversified

application to all the contracts, and to the various operations of government. No one can be selected which is of more vital interest to the community than this of borrowing money on the credit of the United States. No power has been conferred by the American people on their government, the free and unburdened exercise of which more deeply affects every member of our republic. In war, when the honor, the safety, the independence of the nation are to be defended, when all its resources are to be strained to the utmost, credit must be brought in aid of taxation, and the abundant revenue of peace and prosperity must be anticipated to supply the exigencies, the urgent demands of the moment. The people, for objects the most important which can occur in the progress of nations, have empowered their government to make these anticipations, "to borrow money on the credit of the United States." Can anything be more dangerous, or more injurious, than the admission of a principle which authorizes every State and every corporation in the Union which possesses the right of taxation, to burden the exercise of this power at their discretion?

If the right to impose the tax exists, it is a right which in its nature acknowledges no limits. It may be carried to any extent within the jurisdiction of the State or corporation which imposes it, which the will of each State and corporation may prescribe. A power which is given by the whole American people for their common good, which is to be exercised at the most critical periods for the most important purposes, on the free exercise of which the interests certainly, perhaps the liberty of the whole may depend; may be burdened, impeded, if not arrested, by any of the organized parts of the confederacy.

In a society formed like ours, with one supreme government for national purposes, and numerous State governments for other purposes, in many respects independent, and in the uncontrolled exercise of many important powers, occasional interferences ought not to surprise us. The power of taxation is one of the most essential to a State, and one of the most extensive in its operation. The attempt to maintain a rule which shall limit its exercise, is undoubtedly among the most delicate and difficult duties which can devolve on those whose province it is to expound the supreme law of the land in its application to the cases of individuals. This duty has more than once devolved on this court. In the performance of it we have considered it as a necessary consequence from the supremacy of the government of the whole, that its action in the exercise of its legitimate powers, should be free and unembarrassed by any conflicting powers in the possession of its parts; that the powers of a State cannot rightfully be so exercised as to impede and obstruct the free course of those measures which the government of the States united may rightfully adopt.

This subject was brought before the court in the case of *M'ulloch v. The State of Maryland*, 4 Wheaton, 316, when it was thoroughly argued and deliberately considered. The question decided in that case bears a near resemblance to that which is involved in this. It was

an act of Congress. A bank is an instrument carrying on the currency. The govt. allows such banks to be taxed.

discussed at the bar in all its relations, and examined by the court with its utmost attention. We will not repeat the reasoning which conducted us to the conclusion thus formed, but that conclusion was that "all subjects over which the sovereign power of a State extends, are objects of taxation; but those over which it does not extend, are upon the soundest principles exempt from taxation." "The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission;" but not "to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States." "The attempt to use" the power of taxation "on the means employed by the government of the Union in pursuance of the Constitution, is itself an abuse, because it is the usurpation of a power which the people of a single State cannot give."

The court said in that case, that "the States have no power by taxation, or otherwise, to retard, impede, burden, or in any manner control the operation of the constitutional laws enacted by Congress, to carry into execution the powers vested in the general government."

We retain the opinions which were then expressed. A contract made by the government in the exercise of its power, to borrow money on the credit of the United States, is undoubtedly independent of the will of any State in which the individual who lends may reside, and is undoubtedly an operation essential to the important objects for which the government was created. It ought, therefore, on the principles settled in the case of *McCulloch v. The State of Maryland*, to be exempt from State taxation, and consequently from being taxed by corporations deriving their power from States.

It is admitted that the power of the government to borrow money cannot be directly opposed, and that any law directly obstructing its operation would be void; but a distinction is taken between direct opposition and those measures which may consequentially affect it; that is, that a law prohibiting loans to the United States would be void, but a tax on them to any amount, is allowable.

It is, we think, impossible not to perceive the intimate connection which exists between these two modes of acting on the subject

It is not the want of original power in an independent sovereign State, to prohibit loans to a foreign government, which restrains the legislature from direct opposition to those made by the United States. The restraint is imposed by our Constitution. The American people have conferred the power of borrowing money on their government, and by making that government supreme, have shielded its action, in the exercise of this power, from the action of the local governments. The grant of the power is incompatible with a restraining or controlling power, and the declaration of supremacy is a declaration that no such restraining or controlling power shall be exercised.

The right to tax the contract to any extent, when made, must operate upon the power to borrow before it is exercised, and have a

taxation any way could Congress exempt them from taxation? Good question says the answers yes. And so of territorial bonds

sensible influence on the contract. The extent of this influence depends on the will of a distinct government. To any extent, however inconsiderable, it is a burden on the operations of government. It may be carried to an extent which shall arrest them entirely.

It is admitted by the counsel for the defendants, that the power to tax stock must affect the terms on which loans will be made; but this objection, it is said, has no more weight when urged against the application of an acknowledged power to government stock, than if urged against its application to lands sold by the United States.

The distinction is, we think, apparent. When lands are sold, no connection remains between the purchaser and the government. The lands purchased become a part of the mass of property in the country with no implied exemption from common burdens. All lands are derived from the general or particular government, and all lands are subject to taxation. Lands sold are in the condition of money borrowed and repaid. Its liability to taxation in any form it may then assume is not questioned. The connection between the borrower and the lender is dissolved. It is no burden on loans, it is no impediment to the power of borrowing, that the money, when repaid, loses its exemption from taxation. But a tax upon debts due from the government, stands, we think, on very different principles from a tax on lands which the government has sold.

“The Federalist” has been quoted in the argument, and an eloquent and well-merited eulogy has been bestowed on the great statesman who is supposed to be the author of the number from which the quotation was made. This high authority was also relied upon in the case of *McCulloch v. The State of Maryland*, and was considered by the court. Without repeating what was then said, we refer to it as exhibiting our view of the sentiments expressed on this subject by the authors of that work.

It has been supposed that a tax on stock comes within the exceptions stated in the case of *McCulloch v. The State of Maryland*. We do not think so. The Bank of the United States is an instrument essential to the fiscal operations of the government, and the power which might be exercised to its destruction was denied. But property acquired by that corporation in a State was supposed to be placed in the same condition with property acquired by an individual.

The tax on government stock is thought by this court to be a tax on the contract, a tax on the power to borrow money on the credit of the United States, and consequently to be repugnant to the Constitution.

We are, therefore, of opinion that the judgment of the Constitutional Court of the State of South Carolina, reversing the order made by the Court of Common Pleas, awarding a prohibition to the City Council of Charleston, to restrain them from levying a tax imposed on six and seven per cent stock of the United States, under an ordinance to raise supplies to the use of the city of Charleston for the year 1823, is erroneous in this; that the said Constitutional Court adjudged

that the said ordinance was not repugnant to the Constitution of the United States; whereas, this court is of opinion that such repugnancy does exist. We are, therefore, of opinion that the said judgment ought to be reversed and annulled, and the cause remanded to the Constitutional Court for the State of South Carolina, that farther proceedings may be had therein according to law.¹

[JOHNSON, J., and THOMPSON, J., gave dissenting opinions, to the effect that the tax was good as being a general tax on incomes, and that there was no sufficient reason for holding the income from United States securities exempt.]

¹ And so *The Banks v. The Mayor*, 7 Wall. 16 (1868). In *Bank v. Supervisors*, Id. 26 (1868), the same question arose in relation to the legal-tender notes of the United States. CHASE, C. J., for the court, said: "That these notes were issued under the authority of the United States, and as a means to ends entirely within the constitutional power of the government, was not seriously questioned upon the argument.

"But it was insisted that they were issued as money; that their controlling quality was that of money, and that therefore they were subject to taxation in the same manner, and to the same extent, as coin issued under like authority.

"And there is certainly much force in the argument. It is clear that these notes were intended to circulate as money, and, with the national bank-notes, to constitute the credit currency of the country.

"Nor is it easy to see that taxation of these notes, used as money, and held by individual owners, can control or embarrass the power of the government in issuing them for circulation, more than like taxation embarrasses its power in coining and issuing gold and silver money for circulation.

"Apart from the quality of legal tender impressed upon them by Acts of Congress, of which we now say nothing, their circulation as currency depends on the extent to which they are received in payment, on the quantity in circulation, and on the credit given to the promises they bear. In these respects they resemble the bank-notes formerly issued as currency.

"But, on the other hand, it is equally clear that these notes are obligations of the United States. Their name imports obligation. Every one of them expresses upon its face an engagement of the nation to pay to the bearer a certain sum. The dollar note is an engagement to pay a dollar, and the dollar intended is the coined dollar of the United States; a certain quantity in weight and fineness of gold or silver, authenticated as such by the stamp of the government. No other dollars had before been recognized by the legislation of the national government as lawful money.

"Would, then, their usefulness and value as means to the exercise of the functions of government, be injuriously affected by State taxation?

"It cannot be said, as we have already intimated, that the same inconveniences as would arise from the taxation of bonds and other interest-bearing obligations of the government, would attend the taxation of notes issued for circulation as money. But we cannot say that no embarrassment would arise from such taxation. And we think it clearly within the discretion of Congress to determine whether, in view of all the circumstances attending the issue of the notes, their usefulness, as a means of carrying on the government, would be enhanced by exemption from taxation; and within the constitutional power of Congress, having resolved the question of usefulness affirmatively, to provide by law for such exemption.

"There remains, then, only this question, Has Congress exercised the power of exemption? A careful examination of the Acts under which they were issued, has left no doubt in our minds upon that point."—ED.

DOBBINS v. THE COMMISSIONERS OF ERIE COUNTY.

SUPREME COURT OF THE UNITED STATES. 1842.

[16 *Pet.* 435.]

In error to the Supreme Court of Pennsylvania.

In the Court of Common Pleas of Erie County, the plaintiff in error instituted an action against the commissioners of Erie County, the purpose of which was to have a decision on the right asserted by the commissioners of the county to assess and collect taxes on the office of the plaintiff, a citizen, and residing in Erie County, Pennsylvania, a captain of the United States revenue cutter.

The following case was stated and submitted to the court; either party to have the right to prosecute a writ of error.

“The plaintiff is and has been for the last eight years an officer of the United States, to wit, captain of the United States revenue cutter service; and ever since his appointment has been in service in command of the United States revenue cutter Erie, on the Erie station. He has been rated and assessed with county taxes for the last three years, to wit, 1835, 1836, and 1837, as such officer of the United States, for his office, as such, valued at five hundred dollars; which taxes, so rated and assessed and paid by the plaintiff, amount to the sum of ten dollars and seventy-five cents.

“The question submitted to the court is, whether the plaintiff is liable to be rated and assessed for his office under the United States for county rates and levies; if he is, then judgment to be entered for the defendants; if not, then judgment to be entered for the plaintiff for the sum of ten dollars and seventy-five cents.”

The Court of Common Pleas gave judgment for the plaintiff, and the case was removed to the Supreme Court of Pennsylvania; in which court the judgment was reversed, and a judgment was entered for the commissioners of Erie County. The plaintiff, Daniel Dobbins, prosecuted this writ of error.

The case was submitted to the court by *Mr. Galbraith*, for the plaintiff, and by *Mr. Penrose*, for the defendants, on printed arguments.

MR. JUSTICE WAYNE delivered the opinion of the court. . . .

The assessment was made by the commissioners of Erie County under the Act of Pennsylvania of the 15th April, 1834. It is believed to be the only instance of a tax being rated in that State upon the office of an officer of the United States. It has, however, received the sanction of the Supreme Court. If it can be lawfully done, it cannot be doubted that similar assessments will be made under that law, upon all other officers of the United States, in Pennsylvania. The language of the court is, “the case is put on the power and right to impose the tax. In other words, is this a legitimate subject of taxation? Perhaps this

may, in some measure, depend on, whether, within the true meaning of the Acts, it is the office itself, or the emoluments of the office which are made the subjects of taxation." In the preceding extract we gave the language of the court. The law is, that an account shall be taken of "all offices and posts of profit." The next section makes it the duty of the assessors "to rate all offices and posts of profit, professions, trades, and occupations, at their discretion, having a due regard to the profits arising therefrom."

The emoluments of the office, then, are taxable, and not the office. But, whether it be one or the other, we cannot perceive how a tax upon either conduces to comprehend within the terms of the Act, the office or the compensation of an officer of the United States. It will not do to say, as it was said in argument, that though the language of the Act may import that offices and posts of profit were taxable, that it was the citizen who holds the office whom the law intended to tax, and that it was a burden he was bound to bear in return for the privileges enjoyed, and the protection received from government; and, then, that the liability to pay the tax was a personal charge, because the person upon whom it was assessed was a taxable person.

The first answer to be given to these suggestions, is, that the tax is to be levied upon a valuation of the income of the office. But, besides the obligation upon persons to pay taxes, is mistaken, and the sense in which a tax is a personal charge, is misunderstood. The foundation of the obligation to pay taxes, is not the privileges enjoyed or the protection given to a citizen by government, though the payment of taxes gives a right to protection. Both are enjoyed, as well by those members of a State who do not, because they are not able to pay taxes, as by those who are able, and do pay them. Married women and children have privileges and protection, but they are not assessed, unless they have goods or property separate from the heads of families. The necessity of money for the support of States in times of peace or war, fixes the obligation upon their citizens to pay such taxes as may be imposed by lawful authority. And the only sense in which a tax is a personal charge, is, that it is assessed upon personal estate, and the profits of labor and industry. It is called a personal charge, to distinguish such a tax from the tax upon lands and tenements, which are enforced without any regard to the persons who are the owners. Taxes are never assessed, unless it be a capitation tax, upon persons as persons, but upon them on account of their goods, and the profits made upon professions, trades, and occupations. They are so imposed, because public revenue can only be supplied by assessments upon the goods of individuals — "comprehending under the word 'goods,' all the estate and effects which every one hath, of whatsoever sort they be. Taxes regard the persons of men only because of their goods." The goods then are taxed and not the person. But those who are to pay the tax are taxable persons, because they are under an obligation to contribute from their means to the necessities

of the State. The obligation, however, only becomes a charge upon the person in consequence of the power in the State to enforce the payment of taxes by coercion. This power extends to the sequestration of the goods, and the imprisonment of the delinquent. A tax, according to the object upon which it is laid, may be a personal charge; but that is a very different thing from its becoming a charge upon the person, in consequence of the coercion which may be provided by law to enforce the payment.

We have been more particular in noticing this argument, because it enabled us to put the point upon which it was intended to bear upon right principles. Besides, as it was drawn from the statutes of Pennsylvania, it implied the supposition that her legislature, in these enactments upon taxation, had disregarded those principles. But this is not so. If the occasion was a proper one for this court to do it, we might easily show that the Act throughout, was framed upon an enlightened recognition by the legislators of that State, of all the principles upon which taxes are imposed. The only difficulty in the Act has arisen from the terms directing assessments to be made upon all offices and posts of profit, without restricting the assessments to offices and posts of profit held under the sovereignty of that State; and not excluding them from being made upon offices and posts of profit of another sovereignty—the United States.

The case being now cleared of other objections, except such as relate to the unconstitutionality of the tax, we will consider the real and only question in it; that is, “whether the plaintiff is liable to be rated and assessed for his office under the United States, for county rates and levies?” It is not necessary for the decision of this question, that the power of taxation in the States, and in the United States, under the Constitution of the latter, should be minutely discussed.

Taxation is a sacred right, essential to the existence of government; an incident of sovereignty. The right of legislation is coextensive with the incident, to attach it upon all persons and property within the jurisdiction of a State. But in our system there are limitations upon that right. There is a concurrent right of legislation in the States and the United States, except as both are restrained by the Constitution of the United States. Both are restrained upon this subject, by express prohibitions in the Constitution. And the States, by such as are necessarily implied when the exercise of the right by a State conflicts with the perfect execution of another sovereign power, delegated to the United States. That occurs when taxation by a State acts upon the instruments, emoluments, and persons, which the United States may use and employ as necessary and proper means to execute their sovereign powers. The government of the United States is supreme within its sphere of action. The means necessary and proper to carry into effect the powers in the Constitution are in Congress. Taxation is a sovereign power in a State; but the collection of revenue by imposts upon imported goods, and the regulation of commerce, are

also sovereign powers in the United States. Let us apply then the principles just stated, and the powers mentioned to the case in judgment, and see what will be the result.

Congress has power to lay and collect taxes, duties, imposts, &c., and to regulate commerce with foreign nations and among the several States, and with the Indian tribes. Neither can be done without legislation. A complicated machinery of forms, instruments, and persons must be established; revenue districts were to be designated; collectors, naval officers, surveyors, inspectors, appraisers, weighers, measurers, and gaugers must be employed; "the better to secure the collection of duties on goods and on the tonnage of vessels," revenue cutters, and officers to command them are necessary. The latter are declared to be officers of the customs, and they have large powers and authority. All of this is legislation by Congress to execute sovereign powers. They are the means necessary to an allowed end: the end, the great objects which the Constitution was intended to secure to the States in their character of a nation. Is the officer, as such, less a means to carry into effect these great objects than the vessel which he commands, the instruments which are used to navigate her, or than the guns put on board to enforce obedience to the law? These inanimate objects, it is admitted, cannot be taxed by a State, because they are means. Is not the officer more so, who gives use and efficacy to the whole? Is not compensation the means by which his services are procured and retained? It is true it becomes his when he has earned it. If it can be taxed by a State as compensation, will not Congress have to graduate its amount, with reference to its reduction by the tax? Could Congress use an uncontrolled discretion in fixing the amount of compensation, as it would do without the interference of such a tax? The execution of a national power by way of compensation to officers, can in no way be subordinate to the action of the State Legislatures upon the same subject. It would destroy also all uniformity of compensation for the same service, as the taxes by the States would be different. To allow such a right of taxation to be in the States, would also in effect be to give the States a revenue out of the revenue of the United States, to which they are not constitutionally entitled, either directly or indirectly: neither by their own action, nor by that of Congress. The revenue of the United States is intended by the Constitution, to pay the debts, and provide for the common defence and general welfare of the United States; to be expended, in particulars, in carrying into effect the laws made to execute all the express powers, "and all other powers vested by the Constitution in the government of the United States." But the unconstitutionality of such taxation by a State as that now before us may be safely put — though it is not the only ground — upon its interference with the constitutional means which have been legislated by the government of the United States to carry into effect its powers to lay and collect taxes, duties, imposts, &c., and to regulate commerce. In our view, it presents a case of as

strong interference as was presented by the tax imposed by Maryland, in the case of *M'Culloch*, 4 Wheat. 316; and the tax by the City Council of Charleston, in *Weston's* case, 2 Peters. 449: in both of which it was decided by this court, that the State governments cannot lay a tax upon the constitutional means employed by the government of the Union to execute its constitutional powers

But we have said that the ground upon which we have just put the unconstitutionality of the tax in the case before us, is not the sole ground upon which our conclusion can be maintained. We will now state another ground; and we do so because it is applicable to exempt the salaries of all officers of the United States from taxation by the States.

The powers of the national government can only be executed by officers whose services must be compensated by Congress. The allowance is in its discretion. The presumption is that the compensation given by law is no more than the services are worth, and only such in amount as will secure from the officer the diligent performance of his duties. "The officers execute their offices for the public good. This implies their right of reaping from thence the recompense the services they may render may deserve;" without that recompense being in any way lessened, except by the sovereign power from whom the officer derives his appointment, or by another sovereign power to whom the first has delegated the right of taxation over all the objects of taxation, in common with itself, for the benefit of both. And no diminution in the recompense of an officer is just and lawful, unless it be prospective, or by way of taxation by the sovereignty who has a power to impose it; and which is intended to bear equally upon all according to their estate.

The compensation of an officer of the United States is fixed by a law made by Congress. It is in its exclusive discretion to determine what shall be given. It exercises the discretion and fixes the amount, and confers upon the officer the right to receive it when it has been earned. Does not a tax then by a State upon the office, diminishing the recompense, conflict with the law of the United States, which secures it to the officer in its entirety? It certainly has such an effect; and any law of a State imposing such a tax cannot be constitutional, because it conflicts with a law of Congress made in pursuance of the Constitution, and which makes it the supreme law of the land.

We are, therefore, of opinion, that the judgment of the Supreme Court of Pennsylvania, reversing the judgment of the Court of Common Pleas of Erie County, declaring the plaintiff was not liable to be rated and assessed for county rates and levies for his office under the United States, is erroneous; in this — that the said Supreme Court adjudged that the Act of Pennsylvania embracing all offices and posts of profit, comprehending offices of the United States, was not repugnant to the Constitution and laws of the United States; whereas this court is of opinion that such repugnancy does exist. We are, there-

fore, of opinion that the said judgment ought to be reversed and annulled; and the cause remanded to the said Supreme Court of Pennsylvania, in and for the western district, with directions to affirm the judgment of the Court of Common Pleas of Erie County.¹

In *Bank of Commerce v. New York City*, 2 Black, 620 (1862), the capital of the plaintiff was chiefly invested in "stocks, bonds, and securities" of the United States. NELSON, J., for the court, said: "The question involved in this case is, whether or not the stock of the United States, constituting a part or the whole of the capital stock of a bank organized under the banking laws of New York, is subject to State taxation. The capital of the bank is taxed under existing laws in that State upon valuation like the property of individual citizens, and not as formerly on the amount of the nominal capital, without regard to loss or depreciation. According to that system of taxation it was immaterial as to the character or description of property which constituted the capital, as the tax imposed was wholly irrespective of it. The tax was like one annexed to the franchise as a royalty for the grant. But since the change of this system, it is agreed the tax is upon the property constituting the capital." Held, that the case was within the principle of *Weston v. Charleston*.

In the *Bank Tax Case*, 2 Wall. 200 (1864), under a New York statute of 1863, passed just after the decision in *Bank of Commerce v. N. Y. City*, banks in that State whose capital was invested in bonds of the United States were taxed "on a valuation equal to the amount of their capital stock paid in or secured to be paid in." NELSON, J., for the court, in holding the case to be substantially the same as *Bank of Commerce v. N. Y. City*, said: "Now, where the capital of the banks is required or authorized by the law to be invested in stocks, and, among others, in United States stock, under their charters or articles of association, and this capital thus invested is made the basis of taxation of the institutions, there is great difficulty in saying that it is not the stock thus constituting the corpus or body of the capital that is taxed. It is not easy to separate the property in which the capital is invested from the capital itself. It requires some refinement to separate the two thus intimately blended together. The capital is not an ideal, fictitious, arbitrary sum of money set down in the articles of association, but in the theory and practical operation of the system, is composed of substantial property, and which gives value and solidity to the stock of the institution. It is the foundation of its credit in the business community. The legislature well knew the peculiar system under which these institutions were incorporated, and the working of it; and when providing for a tax on their capital at a valuation, they could not but have intended a tax upon the property in which the capital had been

¹ Compare *U. S. v. R. R. Co.*, 17 Wall. 322; *Melcher v. Boston*, 9 Met. 73. — Ed.

*Melcher v. Boston was a case for post office stock
& it was held that the income could be taxed*

invested. We have seen that such is the practical effect of the tax, and we think it would be doing injustice to the intelligence of the legislature to hold that such was not their intent in the enactment of the law."¹

VAN ALLEN v. THE ASSESSORS.

SUPREME COURT OF THE UNITED STATES. 1865.

[3 Wall. 573.]

THIS was a suit involving the question of right, on the part of States, to tax shares in the national banking associations created under the Act of Congress of June, 1864. . . . [The statement of facts is omitted.]

Numerous counsel appeared in the matter; some in this immediate case, others in other cases just like it from the other places. Among them *Mr. Ecarts*, *Mr. Sedgwick*, *Mr. Tremaine*, *Messrs. Edmonds* and *Miller*, argued against the right of the States to tax, and *Mr. Kernan*, *Mr. A. J. Parker*, and *Mr. Reynolds* in favor of it. . . .

MR. JUSTICE NELSON delivered the opinion of the court.

The decree of the Court of Appeals, from which this case comes to us, must be reversed, on the ground that the enabling Act of the State of New York, passed March 9, 1865, does not conform to the limitations prescribed by the Forty-First Section of the Act of Congress, passed June 3, 1864, organizing the national banks, and providing for their taxation.² The defect is this: one of the limitations in the Act of Congress is, "that the tax so imposed under the laws of any State upon the shares of the associations authorized by this Act, shall not exceed the rate imposed upon the shares of any of the banks organized under the authority of the State where such association is located." The enabling Act of the State contains no such limitation. The banks of the State are taxed upon their capital; and although the Act provides that the tax on the shares of the national banks shall not exceed the par value, yet, inasmuch as the capital of the State banks may consist of the bonds of the United States, which are exempt from State taxation, it is easy to see that this tax on the capital is not an equivalent for a tax on the shares of the stockholders.

This is an unimportant question, however, as the defect may be readily remedied by the State legislature.

¹ See *Manhattan Co. v. Blake*, 133 U. S. 412 (1892). — ED.

² "That shares of stock in a national bank are not subject to taxation without the consent of Congress is conceded. *McCulloch v. Md.*, 4 Wheat. 316; *Osborn v. Bk. U. S.*, 9 Wheat. 738; *Weston v. Charleston*, 2 Pet. 449; *People v. Weaver*, 100 U. S. 539." — BREWER, J., for the court, in *Talbot v. Silver Bow County*, 139 U. S. 438, 440 (1891). — a case where the unsuccessful contention was that the permission of Congress did not cover the Territories. — ED.

The main and important question involved, and the one which has been argued at great length and with eminent ability, is, whether the State possesses the power to authorize the taxation of the shares of these national banks in the hands of stockholders, whose capital is wholly vested in stock and bonds of the United States?

The court are of opinion that this power is possessed by the State, and that it is due to the several cases which have been so fully and satisfactorily argued before us at this term, as well as to the public interest involved, that the question should be finally disposed of. I shall proceed, therefore, to state, as briefly as practicable, the grounds and reasons that have led to their judgment in the case.

The first Act providing for the organization of these national banks, passed 25th February, 1863, contained no provision concerning State taxation of these shares; but Congress reserved the right by the last section at any time "to amend, alter, or repeal the Act." The present Act of 1864 is a re-enactment of the prior statute, with some material amendments, of which the section concerning State taxation is one.

It will be readily perceived, on adverting to the Act, that the powers and privileges conferred by it upon these associations are very great powers and privileges; — founded upon a new use and application of these government bonds, especially the privilege of issuing notes to circulate in the community as money, to the amount of ninety per centum of the bonds deposited with the treasurer; thereby nearly doubling their amount for all the operations and business purposes of the bank. This currency furnishes means and facilities for conducting the operations of the associations, which, if used wisely and skilfully, cannot but result in great advantages and profits to all the members of the association — the shareholders of the bank.

In the granting of chartered rights and privileges by government, especially if of great value to the corporators, certain burdens are usually, if not generally, imposed as conditions of the grant. Accordingly we find them in this charter. They are very few, but distinctly stated.

They are, first, a duty of one-half of one per centum each half-year, upon the average amount of its notes in circulation; second, a duty of one-quarter of one per centum each half-year upon the average amount of its deposits; third, a duty of one-quarter of one per centum each half-year on the average amount of its capital stock beyond the amount invested in United States bonds; and fourth, a State tax upon the shares of the association held by the stockholders, not greater than assessed on other moneyed capital in the State, nor to exceed the rate on shares of stock of State banks. These are the only burdens annexed to the enjoyment of the great chartered rights and privileges that we find in this Act of Congress; and no objection is made to either of them except the last, — the limited State taxation.

Although it has been suggested, yet it can hardly be said to have been argued, that the provision in the Act of Congress concerning the taxation of the shares by the State is unconstitutional. The sugges-

tion is, that it is a tax by the State upon the bonds of the government which constitute the capital of the bank, and which this court has heretofore decided to be illegal. But this suggestion is scarcely well founded; for were we to admit, for the sake of the argument, this to be a tax of the bonds or capital stock of the bank, it is but a tax upon the new uses and new privileges conferred by the charter of the association; it is but a condition annexed to the enjoyment of this new use and new application of the bonds; and if Congress possessed the power to grant these new rights and new privileges, which none of the learned counsel has denied, and which the whole argument assumes, then we do not see but the power to annex the conditions is equally clear and indisputable. The question involved is altogether a different one from that decided in the previous bank cases, and stands upon different considerations. The State tax, under this Act of Congress, involves no question as to the pledged faith of the government. The tax is the condition for the new rights and privileges conferred upon these associations.

But, in addition to this view, the tax on the shares is not a tax on the capital of the bank. The corporation is the legal owner of all the property of the bank, real and personal; and within the powers conferred upon it by the charter, and for the purposes for which it was created, can deal with the corporate property as absolutely as a private individual can deal with his own. This is familiar law, and will be found in every work that may be opened on the subject of corporations. A striking exemplification may be seen in the case of the *Queen v. Arnould*, 9 Adolphus and Ellis, New Series, 806. The question related to the registry of a ship owned by a corporation. Lord Denman observed: "It appears to me that the British corporation is, as such, the sole owner of the ship. The individual members of the corporation are no doubt interested in one sense in the property of the corporation, as they may derive individual benefits from its increase, or loss from its decrease; but in no legal sense are the individual members the owners."

The interest of the shareholder entitles him to participate in the net profits earned by the bank in the employment of its capital, during the existence of its charter, in proportion to the number of his shares; and, upon its dissolution or termination, to his proportion of the property that may remain of the corporation after the payment of its debts. This is a distinct independent interest or property, held by the shareholder like any other property that may belong to him. Now, it is this interest which the Act of Congress has left subject to taxation by the States, under the limitations prescribed, as will be seen on referring to it. That Act provides as follows:

"That nothing in this Act shall be construed to prevent all the shares of any of the said associations, held by any person or body corporate, from being included in the valuation of personal property of such person or corporation in the assessment of taxes imposed by and

under State authority, at the place where such bank is located, and not elsewhere, but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State; provided further, that the tax so imposed under the laws of any State, upon the shares of the associations, authorized by this Act, shall not exceed the rate imposed upon the shares of any of the banks organized under the authority of the State where such association is located: provided, also, that nothing in this Act shall exempt the real estate of associations from either State, county, or municipal taxes, to the same extent, according to its value, as other real estate is taxed." (§ 41.)

It is said that Congress possesses no power to confer upon a State authority to be exercised which has been exclusively delegated to that body by the Constitution, and, consequently, that it cannot confer upon a State the sovereign right of taxation; nor is a State competent to receive a grant of any such power from Congress. We agree to this. But as it respects a subject-matter over which Congress and the States may exercise a concurrent power, but from the exercise of which Congress, by reason of its paramount authority, may exclude the States, there is no doubt Congress may withhold the exercise of that authority and leave the States free to act. An example of this relation existing between the Federal and State governments is found in the pilot-laws of the States, and the health and quarantine laws. The power of taxation under the Constitution as a general rule, and as has been repeatedly recognized in adjudged cases in this court, is a concurrent power. The qualifications of the rule are the exclusion of the States from the taxation of the means and instruments employed in the exercise of the functions of the Federal Government.

The remaining question is, has Congress legislated in respect to these associations, so as to leave the shares of the stockholders subject to State taxation?

We have already referred to the main provision of the Act of Congress on this subject . . . ; and in another section of the Act (40) it is declared "that the president and cashier of every such association shall cause to be kept, at all times, a full and correct list of the names and residences of all the shareholders in the association, and the number of shares held by each, in the office where its business is transacted, and such list shall be subject to the inspection of all shareholders and creditors of the association, and the officers authorized to assess taxes under State authority, during business hours of each day," &c.

These two provisions — the one declaring that nothing in the Act shall be construed to prevent the shares from being included in the valuation of the personal property, &c., in the assessment of taxes imposed by State authority; and the other providing for the keeping of the list of the names and residences of the shareholders, among other things, for the inspection of the officers authorized to assess the State taxes — not only recognize, in express terms, the sovereign right of the State to tax, but prescribe regulations and duties to these associa-

tions, with a view to disembarass the officers of the State engaged in the exercise of this right. Nothing, it would seem, could be made plainer, or more direct and comprehensive on the subject. The language of the several provisions is so explicit and positive as scarcely to call for judicial construction.

Then, as to the shares, and what is intended by the use of the term? The language of the Act is equally explicit and decisive. . . .

Now, in view of these several provisions in which the term shares, and shareholders, are mentioned, and the clear and obvious meaning of the term in the connection in which it is found, namely, the whole of the interest in the shares and of the shareholders; when the statute provides, that nothing in this Act shall be construed to prevent all the shares in any of the said associations, &c., from being included in the valuation of the personal property of any person or corporation in the assessment of taxes imposed by State authority, &c., can there be a doubt but that the term "shares," as used in this connection, means the same interest as when used in the other portions of the Act? Take, for examples, the use of the term in the certificate of the numbers of shares in the articles of association, in the division of the capital stock into shares of one hundred dollars each; in the personal liability clause, which subjects the shareholder to an amount, and, in addition, to the amount invested in such shares; in the election of directors, and in deciding all questions at meetings of the stockholders, each share is entitled to one vote; in regulations of the payments of the shares subscribed; and, finally, in the list of shares kept for the inspection of the State assessors. In all these instances, it is manifest that the term as used means the entire interest of the shareholder; and it would be singular, if in the use of the term in the connection of State taxation, Congress intended a totally different meaning, without any indication of such intent.

This is an answer to the argument that the term, as used here, means only the interest of the shareholder as representing the portion of the capital, if any, not invested in the bonds of the government, and that the State assessors must institute an inquiry into the investment of the capital of the bank, and ascertain what portion is invested in these bonds, and make a discrimination in the assessment of the shares. If Congress had intended any such discrimination, it would have been an easy matter to have said so. Certainly, so grave and important a change in the use of this term, if so intended, would not have been left to judicial construction.

Upon the whole, after the maturest consideration which we have been able to give to this case, we are satisfied that the States possess the power to tax the whole of the interest of the shareholder in the shares held by him in these associations, within the limit prescribed by the Act authorizing their organization. But, for the reasons stated in the forepart of the opinion, the judgment must be reversed and the case

remitted to the Court of Appeals of the State of New York, with directions to enter judgment for the plaintiffs in error, with costs.

CHASE, C. J., for himself and WAYNE and SWAYNE, JJ., gave an opinion concurring in the reversal of the judgment below on the first ground named in the opinion of the court, but dissenting on the main points discussed.¹

¹ *Van Allen v. The Assessors* was affirmed in *People v. Com'rs*, 4 Wall. 244 (1866) (with the same dissent), — the court, NELSON, J., remarking of *Van Allen v. The Assessors*, "That case was one of a large class of cases which were very thoroughly argued, and received at the time the most careful consideration of the court."

Compare *Soc. for Savings v. Coite*, 6 Wall. 594; *Prov. Inst. v. Mass.*, Id. 611; *Ham. Co. v. Mass.*, Id. 632; *Conn. Mut. L. Ins. Co. v. Com'th*, 133 Mass. 161; *Merc. Bk. v. N. Y.*, 121 U. S. 138 (1886).

In *Nat. Bk. v. Com'th*, 9 Wall. 353 (1869), where a tax (held to be a tax upon the shares of stock-holders) was laid under a law of Kentucky, which required that "the cashier of a bank whose stock is taxed shall on [&c.] pay into the treasury the amount of tax due," the court (MILLER, J.) said: "But it is strongly urged that it is to be deemed a tax on the capital of the bank, because the law requires the officers of the bank to pay this tax on the shares of its stockholders. Whether the State has the right to do this we will presently consider, but the fact that it has attempted to do it does not prove that the tax is anything else than a tax on these shares. It has been the practice of many of the States for a long time to require of its corporations, thus to pay the tax levied on their shareholders. It is the common, if not the only, mode of doing this in all the New England States, and in several of them the portion of this tax which should properly go as the shareholder's contribution to local or municipal taxation is thus collected by the State of the bank and paid over to the local municipal authorities. In the case of shareholders not residing in the State, it is the only mode in which the State can reach their shares for taxation. We are, therefore, of opinion that the law of Kentucky is a tax upon the shares of the stockholder. If the State cannot require of the bank to pay the tax on the shares of its stock it must be because the Constitution of the United States, or some Act of Congress, forbids it. There is certainly no express provision of the Constitution on the subject.

"But it is argued that the banks, being instrumentalities of the Federal government, by which some of its important operations are conducted, cannot be subjected to such State legislation. It is certainly true that the Bank of the United States and its capital were held to be exempt from State taxation on the ground here stated, and this principle, laid down in the case of *McCulloch v. The State of Maryland*, has been repeatedly affirmed by the court. But the doctrine has its foundation in the proposition that the right of taxation may be so used in such cases as to destroy the instrumentalities by which the government proposes to effect its lawful purposes in the States, and it certainly cannot be maintained that banks or other corporations or instrumentalities of the government are to be wholly withdrawn from the operation of State legislation. (The most important agents of the Federal government are its officers, but no one will contend that when a man becomes an officer of the government he ceases to be subject to the laws of the State.) The principle we are discussing has its limitation, a limitation growing out of the necessity on which the principle itself is founded. That limitation is, that the agencies of the Federal government are only exempted from State legislation, so far as that legislation may interfere with, or impair their efficiency in performing the functions by which they are designed to serve that government. Any other rule would convert a principle founded alone in the necessity of securing to the government of the United States the means of exercising its legitimate powers, into an unauthorized and unjustifiable invasion of the rights of the States. The salary of a Federal officer may not be taxed; he may be exempted from any personal service which interferes with the discharge of his official duties, because those exemptions are essential to enable him to perform those duties. But he is sub-

CRANDALL v. STATE OF NEVADA.

SUPREME COURT OF THE UNITED STATES. 1867.

[6 Wall. 35.]

ERROR to the Supreme Court of Nevada.

In 1865, the Legislature of Nevada enacted that "there shall be levied and collected a capitation tax of one dollar upon every person leaving the State by any railroad, stage-coach, or other vehicle engaged or employed in the business of transporting passengers for hire," and that the proprietors, owners, and corporations so engaged should pay the said tax of one dollar for each and every person so conveyed or transported from the State. For the purpose of collecting the tax, another section required from persons engaged in such business, or their agents, a report every month, under oath, of the number of pas-

ject to all the laws of the State which affect his family or social relations, or his property, and he is liable to punishment for crime, though that punishment be imprisonment or death. So of the banks. They are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation. All their contracts are governed and construed by State laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on State law. It is only when the State law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional. We do not see the remotest probability of this, in their being required to pay the tax which their stockholders owe to the State for the shares of their capital stock, when the law of the Federal government authorizes the tax.

"If the State of Kentucky had a claim against a stockholder of the bank who was a non-resident of the State, it could undoubtedly collect the claim by legal proceeding, in which the bank could be attached or garnisheed, and made to pay the debt out of the means of its shareholder under its control. This is, in effect, what the law of Kentucky does in regard to the tax of the State on the bank shares. It is no greater interference with the functions of the bank than any other legal proceeding to which its business operations may subject it, and it in no manner hinders it from performing all the duties of financial agent of the government.

"A very nice criticism of the proviso to the 41st section of the National Bank Act, which permits the States to tax the shares of such bank, is made to us to show that the tax must be collected of the shareholder directly, and that the mode we have been considering is by implication forbidden. But we are of opinion that while Congress intended to limit State taxation to the shares of the bank, as distinguished from its capital, and to provide against a discrimination in taxing such bank shares unfavorable to them, as compared with the shares of other corporations, and with other moneyed capital, it did not intend to prescribe to the States the mode in which the tax should be collected. The mode under consideration is the one which Congress itself has adopted in collecting its tax on dividends, and on the income arising from bonds of corporations. It is the only mode which, certainly and without loss, secures the payment of the tax on all the shares, resident or non-resident; and, as we have already stated, it is the mode which experience has justified in the New England States as the most convenient and proper, in regard to the numerous wealthy corporations of those States. It is not to be readily inferred, therefore, that Congress intended to prohibit this mode of collecting a tax which they expressly permitted the States to levy."

Compare *Boston v. Beale*, 51 Fed. Rep. 306. — Ed.

sengers so transported, and the payment of the tax to the sheriff or other proper officer.

With the statute in existence, Crandall, who was the agent of a stage company engaged in carrying passengers through the State of Nevada, was arrested for refusing to report the number of passengers that had been carried by the coaches of his company, and for refusing to pay the tax of one dollar imposed on each passenger by the law of that State. He pleaded that the law of the State under which he was prosecuted was void, because it was in conflict with the Constitution of the United States; and his plea being overruled, the case came into the Supreme Court of the State. That court—considering that the tax laid was not an impost on “exports,” nor an interference with the power of Congress “to regulate commerce among the several States”—decided against the right thus set up under the Federal Constitution. Its judgment was now here for review. No counsel appeared for the plaintiff in error, Crandall, nor was any brief filed in his behalf.

Mr. P. Phillips, who filed a brief for *Mr. T. J. D. Fuller*, for the State of Nevada.

MR. JUSTICE MILLER delivered the opinion of the court.

The question for the first time presented to the court by this record is one of importance. The proposition to be considered is the right of a State to levy a tax upon persons residing in the State who may wish to get out of it, and upon persons not residing in it who may have occasion to pass through it.

It is to be regretted that such a question should be submitted to our consideration, with neither brief nor argument on the part of plaintiff in error. But our regret is diminished by the reflection, that the principles which must govern its determination have been the subject of much consideration in cases heretofore decided by this court.

It is claimed by counsel for the State that the tax thus levied is not a tax upon the passenger, but upon the business of the carrier who transports him.

If the Act were much more skilfully drawn to sustain this hypothesis than it is, we should be very reluctant to admit that any form of words, which had the effect to compel every person travelling through the country by the common and usual modes of public conveyance to pay a specific sum to the State, was not a tax upon the right thus exercised. The statute before us is not, however, embarrassed by any nice difficulties of this character. The language which we have just quoted is, that there shall be levied and collected a capitation tax upon every person leaving the State by any railroad or stage-coach; and the remaining provisions of the Act, which refer to this tax, only provide a mode of collecting it. The officers and agents of the railroad companies, and the proprietors of the stage-coaches are made responsible for this, and so become the collectors of the tax.

We shall have occasion to refer hereafter somewhat in detail, to the

opinions of the judges of this court in *The Passenger Cases* (7 How. 283), in which there were wide differences on several points involved in the case before us. In the case from New York then under consideration, the statute provided that the health commissioner should be entitled to demand and receive from the master of every vessel that should arrive in the port of New York, from a foreign port, one dollar and fifty cents for every cabin passenger, and one dollar for each steerage passenger, and from each coasting vessel, twenty-five cents for every person on board. That statute does not use language so strong as the Nevada statute, indicative of a personal tax on the passenger, but merely taxes the master of the vessel according to the number of his passengers; but the court held it to be a tax upon the passenger, and that the master was the agent of the State for its collection. Chief Justice Taney, while he differed from the majority of the court, and held the law to be valid, said of the tax levied by the analogous statute of Massachusetts, that "its payment is the condition upon which the State permits the alien passenger to come on shore and mingle with its citizens, and to reside among them. It is demanded of the captain; and not from every separate passenger, for convenience of collection. But the burden evidently falls upon the passenger, and he, in fact, pays it, either in the enhanced price of his passage or directly to the captain before he is allowed to embark for the voyage. The nature of the transaction, and the ordinary course of business, show that this must be so."

Having determined that the statute of Nevada imposes a tax upon the passenger for the privilege of leaving the State, or passing through it by the ordinary mode of passenger travel, we proceed to inquire if it is for that reason in conflict with the Constitution of the United States.

In the argument of the counsel for the defendant in error, and in the opinion of the Supreme Court of Nevada, which is found in the record, it is assumed that this question must be decided by an exclusive reference to two provisions of the Constitution, namely: that which forbids any State, without the consent of Congress, to lay any imposts or duties on imports or exports, and that which confers on Congress the power to regulate commerce with foreign nations and among the several States. The question as thus narrowed is not free from difficulties. . . .

But we do not concede that the question before us is to be determined by the two clauses of the Constitution which we have been examining.

The people of these United States constitute one nation. They have a government in which all of them are deeply interested. This government has necessarily a capital established by law, where its principal operations are conducted. Here sits its legislature, composed of senators and representatives, from the States and from the people of the States. Here resides the President, directing, through thousands of agents, the execution of the laws over all this vast country. Here is the seat of the supreme judicial power of the nation, to which all its

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with the regulation of inter state commerce.
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citizens have a right to resort to claim justice at its hands. Here are the great executive departments, administering the offices of the mails, of the public lands, of the collection and distribution of the public revenues, and of our foreign relations. These are all established and conducted under the admitted powers of the Federal government. That government has a right to call to this point any or all of its citizens to aid in its service, as members of the Congress, of the courts, of the executive departments, and to fill all its other offices; and this right cannot be made to depend upon the pleasure of a State over whose territory they must pass to reach the point where these services must be rendered. The government, also, has its offices of secondary importance in all other parts of the country. On the sea-coasts and on the rivers it has its ports of entry. In the interior it has its land offices, its revenue offices, and its sub-treasuries. In all these it demands the services of its citizens, and is entitled to bring them to those points from all quarters of the nation, and no power can exist in a State to obstruct this right that would not enable it to defeat the purposes for which the government was established.

The Federal power has a right to declare and prosecute wars, and, as a necessary incident, to raise and transport troops through and over the territory of any State of the Union.

If this right is dependent in any sense, however limited, upon the pleasure of a State, the government itself may be overthrown by an obstruction to its exercise. Much the largest part of the transportation of troops during the late rebellion was by railroads, and largely through States whose people were hostile to the Union. If the tax levied by Nevada on railroad passengers had been the law of Tennessee, enlarged to meet the wishes of her people, the treasury of the United States could not have paid the tax necessary to enable its armies to pass through her territory.

But if the government has these rights on her own account, the citizen also has correlative rights. He has the right to come to the seat of government to assert any claim he may have upon that government, or to transact any business he may have with it. To seek its protection, to share its offices, to engage in administering its functions. He has a right to free access to its sea-ports, through which all the operations of foreign trade and commerce are conducted, to the sub-treasuries, the land offices, the revenue offices, and the courts of justice in the several States, and this right is in its nature independent of the will of any State over whose soil he must pass in the exercise of it.

The views here advanced are neither novel nor unsupported by authority. The question of the taxing power of the States, as its exercise has affected the functions of the Federal government, has been repeatedly considered by this court, and the right of the States in this mode to impede or embarrass the constitutional operations of that government, or the rights which its citizens hold under it, has been uniformly denied. . . . [Here the court considers the cases of *M'ulloch v. Md.*,

4 Wheat. 316; *Brown v. Md.*, 12 Wheat. 419; *Weston v. Charleston*, 2 Pet. 449.]

In all these cases, the opponents of the taxes levied by the States were able to place their opposition on no express provision of the Constitution, except in that of *Brown v. Maryland*. But in all the other cases, and in that case also, the court distinctly placed the invalidity of the State taxes on the ground that they interfered with an authority of the Federal government, which was itself only to be sustained as necessary and proper to the exercise of some other power expressly granted.

In *The Passenger Cases*, to which reference has already been made, Justice Grier, with whom Justice Catron concurred, makes this one of the four propositions on which they held the tax void in those cases. Judge Wayne expresses his assent to Judge Grier's views; and perhaps this ground received the concurrence of more of the members of the court who constituted the majority than any other. But the principles here laid down may be found more clearly stated in the dissenting opinion of the Chief Justice in those cases, and with more direct pertinency to the case now before us than anywhere else. After expressing his views fully in favor of the validity of the tax, which he said had exclusive reference to foreigners, so far as those cases were concerned, he proceeds to say, for the purpose of preventing misapprehension, that so far as the tax affected American citizens it could not in his opinion be maintained. He then adds: "Living as we do under a common government, charged with the great concerns of the whole Union, every citizen of the United States from the most remote States or territories, is entitled to free access, not only to the principal departments established at Washington, but also to its judicial tribunals, and public offices in every State in the Union. . . . For all the great purposes for which the Federal government was formed we are one people, with one common country. We are all citizens of the United States, and as members of the same community must have the right to pass and repass through every part of it without interruption, as freely as in our own States. And a tax imposed by a State, for entering its territories or harbors, is inconsistent with the rights which belong to citizens of other States as members of the Union, and with the objects which that Union was intended to attain. Such a power in the States could produce nothing but discord and mutual irritation, and they very clearly do not possess it."

Although these remarks are found in a dissenting opinion, they do not relate to the matter on which the dissent was founded. They accord with the inferences which we have already drawn from the Constitution itself, and from the decisions of this court in exposition of that instrument. Those principles, as we have already stated them in this opinion, must govern the present case. . . .

Judgment reversed, and the case remanded to the Supreme Court of the State of Nevada, with directions to discharge the plaintiff in error from custody.

[MR. JUSTICE CLIFFORD, for himself and CHIEF JUSTICE CHASE, gave a short opinion, concurring in the result, but dissenting from the "principal reasons."¹]

THOMSON v. PACIFIC RAILROAD.

SUPREME COURT OF THE UNITED STATES. 1869.

[9 Wall. 579.]

ON certificate of division in opinion between the judges of the Circuit Court for the District of Kansas. The case was this:

The Union Pacific Railway Company, Eastern Division, was originally incorporated in 1855, by the Legislature of the Territory of Kansas, as the Leavenworth, Pawnee, and Western Railroad Company, with authority to construct the road from the west bank of the Missouri to the western boundary of the Territory. Subsequently, in 1862, under an Act of the State of Kansas, it assumed its present name, with authority to unite or consolidate with any other company or companies organized, or to be organized, under the laws of the United States, or of any State or Territory.

Some months later, the Union Pacific Railroad Company was incorporated by Congress, with power (conferred by the original Act of 1862 and various amendatory Acts) to construct a railroad and telegraph westward through the territory of the United States, from the hundredth meridian east of Greenwich, to connect with the Central Pacific Railway Company, incorporated by the State of California, and so to form, in connection with eastern roads, a continuous line from ocean to ocean. Several other railroad companies, already incorporated by Missouri and Iowa, as well as the company just mentioned, chartered by Kansas, were authorized to construct roads through the national territory, so as to join the Union Pacific road on the hundredth meridian; and to all these roads large grants of land were made, and large subsidies engaged on the security of a second mortgage, upon the condition of paying, at maturity, the bonds advanced by way of subsidy, and of rendering certain services to the government in the transmission of messages, and in the transportation of mails, troops, munitions, and other property, at reasonable rates of compensation.

But neither by the original Act, nor by any amendment, did Congress undertake to incorporate any railroad company, or authorize the construction of any railroad within the limits of any State, without the consent of the State concerned. And this was as true of the Union Pacific Railway Company, Eastern Division, as of any other of the roads aided by Congress. Whatever was done by Congress in reference to this last-named road, was done not merely with the consent,

¹ Compare *Woodruff v. Parham*, 8 Wall. 123, 140 (1868). — ED.

maturity and that the road transport the mail troops munitions & other prop. for the govt reasonable rates. The legislature imposed a

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but upon the solicitation, of the State of Kansas. The corporation, however, remained a State corporation, though entitled to certain benefits, and subject to certain duties under the legislation of Congress.

In this state of things, and the Legislature of Kansas having passed a law laying certain taxes upon the property of the company, one Thomson and numerous other persons filed a bill in the Circuit Court of the United States for the District of Kansas, against the Union Pacific Railway Company, Eastern Division, and three persons, whom the bill named, treasurers, respectively, of Douglass, Wyandotte, and Jefferson counties, in the State of Kansas. The bill stated that the complainants were stockholders in the railway company; that under an Act of the Legislature of Kansas certain taxes had been imposed on the railroad and telegraph property of the company, which the treasurers of the counties named were proceeding to collect; that the property of the company was mortgaged to the United States; that the company was bound to perform certain duties, and ultimately to pay five per cent of its net earnings to the United States; that the company would be greatly hindered and embarrassed in the performance of its obligations and duties to the United States, if the taxes imposed should be collected; and that, to some extent, taxes of the same description had been already paid by the company, to the prejudice of the just rights of the complainants and of the securities of the United States. Upon this case the complainants prayed an injunction to restrain the company from paying, and the other defendants from collecting, the taxes assessed; and a temporary injunction was allowed by the district judge.

The answer of the company admitted the allegations of the bill. The answers of the three county treasurers admitted the assessment of the taxes under the laws of Kansas, but denied that such taxes had been imposed with any view to impede or embarrass the railway company, and insisted that the property of the company only bore its due proportion of the taxes levied upon all property in the State of Kansas, and that no discrimination was made against the company in the matter of taxation.

To these answers no replication was put in; but an agreed statement of facts was filed, which recited sundry resolutions of the Kansas Legislature, urging upon Congress legislation in aid of the railway company; and admitted that the property of the company was liable, under the laws of Kansas, to be taxed for State, county, and municipal purposes; that the taxes complained of had been assessed in conformity with the statutes of the State; that the company had executed a first mortgage prior in lien to the debt to the United States, and that a table of earnings and expenditures for 1867-68, appended to the agreed statement, was correct.

Upon these pleadings and this agreed statement the question arose, whether the property of the railway company described in the bill was subject to the tax which the statutes of Kansas authorized to be levied

not always a taxation of the means of govt.

on all other property, not specially exempted, for State, county, and municipal purposes. And upon this question the judges of the Circuit Court were divided in opinion, and certified it for decision here.

Mr. Hoar, Attorney-General, and *Mr. Usher*, for the complainant. A brief was also submitted against the right of the States to tax, by *Mr. J. H. Storr*, of counsel for the Central Pacific Railroad of California, and of the Western Pacific Railroad Company. *Mr. Banks*, for the defendants; a brief of *Mr. Thatcher* being filed.

The CHIEF JUSTICE delivered the opinion of the court.

In this case the court has no concern with any of the connected roads which form, or are destined to form, links in the great chain of transcontinental railway. We have only to consider the liabilities and rights of the Union Pacific Railroad Company in respect to taxation under State legislation. Argument has been heard on behalf of some of the connected corporations, only because of their interest in the question, by reason of their similar situation and circumstances in reference to like legislation.

The counsel for the complainants have justly said that the question certified here for decision is one of very grave importance.

It was suggested, rather than argued, by one of them, that the property of the State is exempt by the State Constitution from taxation; and that the State, having reserved to itself in the charter the right to purchase the road at the end of fifty years at a valuation then to be made, upon two years' notice to the company, has, therefore, a property in the road which cannot be taxed. But it is too plain for argument that the interest thus reserved is too remote and too contingent to be regarded as within the meaning of the exemption.

The main argument for the complainants, however, is that the road, being constructed under the direction and authority of Congress, for the uses and purposes of the United States, and being a part of a system of roads thus constructed, is therefore exempt from taxation under State authority. It is to be observed that this exemption is not claimed under any Act of Congress. It is not asserted that any Act declaring such exemption has ever received the sanction of the national legislature. But it is earnestly insisted that the right of exemption arises from the relations of the road to the general government. It is urged that the aids granted by Congress to the road were granted in the exercise of its constitutional powers, to regulate commerce, to establish post-offices and post-roads, to raise and support armies, and to suppress insurrection and invasion; and that by the legislation which supplied aid, required security, imposed duties, and finally exacted, upon a certain contingency, a percentage of income, the road was adopted as an instrument of the government, and as such was not subject to taxation by the State.

The case of *McCulloch v. Maryland* is much relied on in support of this position. But we apprehend that the reasoning of the court in that case will hardly warrant the conclusion which counsel deduce from it in

line be drawn? But may not the prop. be taxed to such an extent as to impede the function or agency in the performance of du

this. In that case the main questions were, Whether the incorporation of the Bank of the United States, with power to establish branches, was an Act of legislation within the constitutional powers of Congress, and, whether the bank and its branches, as actually established, were exempt from taxation by State legislation. Both questions were resolved in the affirmative. In deciding the first the court did not hold, as counsel suppose, that Congress, under the Constitution, has absolute and exclusive power to determine whether an Act of legislation is or is not necessary and proper as a means for carrying into effect one or more of its enumerated powers. It defined the words "necessary and proper" as equivalent in meaning to the words "appropriate, plainly adapted, not prohibited, but consistent with the letter and spirit of the Constitution," and held that the incorporation of a bank with branches was a necessary and proper means to the effectual exercise of granted power within the definition thus given. It held further that Congress was, within this limit, the exclusive judge as to the means best adapted to the end proposed, and that its choice of any means of the defined character was restricted only by its own discretion. But the question whether the particular means adopted was within the general grant of incidental powers was determined by the court. A great part of the argument was directed to the proposition that the incorporation of a bank was an exercise of incidental power within the true meaning of the terms "necessary and proper," as explained by the court—an argument which would have been quite superfluous if that question was to be determined finally by the legislative and not by the judicial department of the government.

We do not doubt, however, that upon the principles settled by that judgment, Congress may, in the exercise of powers incidental to the express powers mentioned by counsel, make or authorize contracts with individuals or corporations for services to the government; may grant aids, by money or land, in preparation for, and in the performance of, such services; may make any stipulation and conditions in relation to such aids not contrary to the Constitution; and may exempt, in its discretion, the agencies employed in such services from any State taxation which will really prevent or impede the performance of them. But can the right of this road to exemption from such taxation be maintained in the absence of any legislation by Congress to that effect?

It is unquestionably true that the court, in determining the second general question, already stated, did hold that the Bank of the United States, with its branches, was exempt from taxation by the State of Maryland, although no express exemption was found in the charter. But it must be remembered that the Bank of the United States was a corporation created by the United States; and, as an agent in the execution of the constitutional powers of the government, was endowed by the act of creation with all its faculties, powers, and functions. It did not owe its existence, or any of its qualities, to State legislation. And its exemption from taxation was put upon this ground. Nor was the

exemption itself without important limitations. It was declared not to extend to the real property of the bank within the State; nor to interests held by citizens of the State in the institution.

In like manner other means and operations of the government have been held to be exempt from State taxation: as bonds issued for money borrowed (*Weston v. City of Charleston*, 2 Peters, 467); certificates of indebtedness issued for money or supplies (*The Banks v. The Mayor*, 7 Wallace, 24); bills of credit issued for circulation (*Bank v. Supervisors*, Id. 28). There are other instances in which exemption, to the extent it is established in *McCulloch v. Maryland*, might have been held to arise from the simple creation and organization of corporations under Acts of Congress, as in the case of the national banking associations; but in which Congress thought fit to prescribe the extent to which State taxation may be applied. *Van Allen v. The Assessors*, 3 Id. 573; *Bradley v. The People*, 4 Id. 459; *People v. Commissioners*, Id. 244. In all these cases, as in the case of the Bank of the United States, exemption from liability to taxation was maintained upon the same ground. The State tax held to be repugnant to the Constitution was imposed directly upon an operation or an instrument of the government. That such taxes cannot be imposed on the operations of the government, is a proposition which needs no argument to support it. And the same reasoning will apply to instruments of the government, created by itself for public and constitutional ends. But we are not aware of any case in which the real estate, or other property of a corporation not organized under an Act of Congress, has been held to be exempt, in the absence of express legislation to that effect, to just contribution, in common with other property, to the general expenditure for the common benefit, because of the employment of the corporation in the service of the government.

It is true that some of the reasoning in the case of *McCulloch v. Maryland* seems to favor the broader doctrine. But the decision itself is limited to the case of the bank, as a corporation created by a law of the United States, and responsible, in the use of its franchises, to the government of the United States. And even in respect to corporations organized under the legislation of Congress, we have already held, at this term, that the implied limitation upon State taxation, derived from the express permission to tax shares in the national banking associations, is to be so construed as not to embarrass the imposition or collection of State taxes to the extent of the permission fairly and liberally interpreted. *National Bank v. Commonwealth* [9 Wall.], 353; *Lionberger v. Rowse* [9 Wall.], 468.

We do not think ourselves warranted, therefore, in extending the exemption established by the case of *McCulloch v. Maryland* beyond its terms. We cannot apply it to the case of a corporation deriving its existence from State law, exercising its franchise under State law, and holding its property within State jurisdiction and under State protection.

We do not doubt the propriety or the necessity, under the Constitution, of maintaining the supremacy of the general government within its constitutional sphere. We fully recognize the soundness of the doctrine, that no State has a "right to tax the means employed by the government of the Union for the execution of its powers." But we think there is a clear distinction between the means employed by the government and the property of agents employed by the government. Taxation of the agency is taxation of the means; taxation of the property of the agent is not always, or generally, taxation of the means.

No one questions that the power to tax all property, business, and persons, within their respective limits, is original in the States and has never been surrendered. It cannot be so used, indeed, as to defeat or hinder the operations of the national government; but it will be safe to conclude, in general, in reference to persons and State corporations employed in government service, that when Congress has not interposed to protect their property from State taxation, such taxation is not obnoxious to that objection. *Lane County v. Oregon*, 7 Wallace, 77; *National Bank v. Commonwealth*, *supra*, 353.

We perceive no limits to the principle of exemption which the complainants seek to establish. It would remove from the reach of State taxation all the property of every agent of the government. Every corporation engaged in the transportation of mails, or of government property of any description, by land or water, or in supplying materials for the use of the government, or in performing any service of whatever kind, might claim the benefit of the exemption. The amount of property now held by such corporations, and having relations more or less direct to the national government and its service, is very great. And this amount is continually increasing; so that it may admit of question whether the whole income of the property which will remain liable to State taxation, if the principle contended for is admitted and applied in its fullest extent, may not ultimately be found inadequate to the support of the State governments.

The nature of the claims to exemption which would be set up, is well illustrated by that which is advanced in behalf of the complainants in the case before us. The very ground of claim is in the bounties of the general government. The allegation is, that the government has advanced large sums to aid in construction of the road; has contented itself with the security of a second mortgage; has made large grants of land upon no condition of benefit to itself, except that the company will perform certain services for full compensation, independently of those grants; and will admit the government to a very limited and wholly contingent interest in remote net income. And because of these advances and these grants, and this fully compensated employment, it is claimed that this State corporation, owing its being to State law, and indebted for these benefits to the consent and active interposition of the State legislature, has a constitutional right to hold its property exempt from State taxation; and this without any legislation

on the part of Congress which indicates that such exemption is deemed essential to the full performance of its obligations to the government.

We are unable to find in the Constitution any warrant for the exemption from State taxation claimed in behalf of the complainants; and must, therefore, answer the question certified to us in the affirmative.

FIFIELD v. CLOSE.

SUPREME COURT OF MICHIGAN. 1867.

[15 Mich. 505.]

ERROR to Oakland Circuit. This was an action of trespass, commenced before a justice of the peace. There was no appearance on the return day, and judgment was rendered for plaintiff for one hundred dollars' damages and costs. The case was removed by certiorari to the Circuit Court, on the ground that the summons issued by the justice of the peace was void, because no United States revenue stamp was attached thereto. The Circuit Court reversed the judgment of the said justice of the peace.

M. E. Crofoot, for plaintiff in error. *O. F. Wisner*, for defendant in error.

CAMPBELL, J. There is but one question raised in this case, and that is, whether the stamp tax on legal process in State courts is valid. The power of Congress to impose such a charge, as a condition upon litigation, is denied by the plaintiff in error, as inconsistent with the control which the Constitution of the United States guarantees to the State authorities over all such matters as have been left by that instrument under local regulation. The question is one of much importance, inasmuch as it involves fundamental principles bearing upon the nature and attributes of both local and general governments.

In order to comprehend the full meaning of the inquiry, it will be well to consider how far this power of taxation may be carried, if it exists, and what consequences it will draw after it. For, while consequences cannot alter the law, they may be of the utmost value in aiding us to discover what the law is, in reference to such constitutional questions as refer to the nature of our institutions, and the distribution of the various functions of government.

If this power exists, it is derivable from the specific power vested in Congress "To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States." — Art. 1, § 8. It is very well settled that such a tax as is involved in this cause is not a direct tax, within the sense of the Constitution, and, therefore, need not be distributed by the rule of population. — *Hylton v. United States*, 3 Dall. 171. The Constitu-

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tion imposes no limit on any but direct taxes, beyond the requirement that they "shall be uniform throughout the United States." — Art. 1, § 8. There is, therefore, no limit upon the power of Congress (if it can levy these taxes at all), to select any objects within the taxing power, and draw from them any amount of uniform contributions which it may see fit to require. The power to tax any specific thing is unlimited, or it is entirely wanting. There are no bounds within which the discretionary action must be confined. The legislature levying the tax is the sole and ultimate judge of the expediency or necessity of requiring it, and of the extent to which it shall be charged upon any class of taxable articles. And where a legislature acts within the line of its constitutional powers, the motives of its action can never be judicially reviewed, nor can courts in any way determine the propriety of its enactments. Its expressed will disposes of all questions of reason or policy.

Having this unqualified discretionary power to tax to any extent whatever is taxable, that power may easily be extended far enough to destroy anything on which burdens may be imposed, by making those burdens so heavy as to become prohibitory. It is within the experience of most countries that duties may become prohibitory, and where taxes are chargeable specifically, so that particular objects may be taxed at pleasure, the same result may easily be reached by specific impositions upon domestic interests. The argument that such prohibitory action is improbable, has no force whatever in determining the existence or non-existence of the power. There is no legitimate power possessed by any legislature which it may not lawfully carry to an extreme, where extreme action is deemed expedient by the majority of the members. And where a power of destruction has been conferred, it is always possible that it may be exercised, although it may be very improbable. Where a constitution does not limit the action of such an assembly, it must be assumed that the people do not regard a right or institution as important enough to be removed from the control of their representatives. And when those representatives make up their minds that policy requires the abrogation of any system over which they have complete authority, they cannot be held legally incompetent to abolish it. The principle that an unrestrained right to tax involves in law a right to destroy by taxation, has been recognized from the beginning by our courts. It is the foundation of all of those decisions which have been made by the Supreme Court of the United States, asserting the immunity from State interference of the United States government, and its various offices and instrumentalities. In some of the tax cases, the danger of destruction to the agencies of the government was more than theoretical, and the design of the obnoxious legislation was to defeat the measures which Congress had determined on for the public interest. And, therefore, in holding that the general government, and its various agencies and machinery, are exempt from State taxation, the Supreme Court expressly rested their decisions upon the assumption that the

power to tax involves the power to control and to destroy. — *McCulloch v. Maryland*, 4 Wheat. 316; *Osborn v. Bank of the United States*, 9 Id. 733; *Weston v. City Council of Charleston*, 2 Peters, 449; *People of New York v. Commissioners of Taxes*, 2 Black, 620; *Bank Tax Case*, 2 Wallace, 200; *Van Allen v. The Assessors*, 3 Id. 573; *Dobbins v. Commissioners of Erie County*, 16 Pet. 435. A similar principle has led to the protection from State interference of all privileges lawfully granted by the United States. — *Hays v. Pacific Mail Steamship Company*, 17 How. 596; *Gibbons v. Ogden*, 9 Wheat. 1; *Passenger Cases*, 7 How. 283; *Sinnot v. Davenport*, 22 Id. 227.

If Congress has the right to impose a duty or tax upon suits in courts of the States, it follows, as an inevitable conclusion, that such restrictions may be laid upon these proceedings as to put an end to the entire action of those courts, and, for all practical purposes, to produce the same results as if they were abolished. And the question we are called upon to decide is, therefore, whether Congress has power to put an end to the exercise of the judicial power of the States.

Presented in this form, the inquiry involves little short of absurdity. It is one of the cardinal principles of political science that no government can exist without a judicial system. It is the only peaceable means of enforcing private rights, and of protecting the community or the citizen from violence and fraud. A State without courts to enforce its own laws, is an impossibility. And if Congress can destroy or control the State judiciary, it can utterly abrogate the State itself.

No one would contend that the system of government established by the Constitution of the United States can possibly permit of any diminution by the general government of any of the functions which are left under State control. The judicial powers, like the other powers of the Union, are enumerated. They do not cover any considerable number of those subjects which concern the ordinary interests of the people. They punish no ordinary local crimes against the peace and good order of society, committed within the States, and they can entertain jurisdiction of no ordinary litigation between members of the same community. Congress cannot enable the courts of the United States to entertain any except what — as compared with ordinary interests — must be regarded as exceptional cases. The great mass of common-law rights and remedies, asserted by one citizen against his neighbor, are beyond their reach. Our whole system is based upon the principle that local affairs must be administered by State authority, unless where peculiar circumstances have led to the establishment of definite exceptions, resting on special reasons of public policy. The same supreme power which established the departments of the general government, determined that the local governments should also exist for their own purposes, and made it impossible to protect the people in their common interests without them. Each of these several agencies is confined to its own sphere, and all are strictly subordinate to the Constitution which limits them, and independent of other agencies, except as thereby

made dependent. There is nothing in the Constitution which can be made to admit of any interference by Congress with the secure existence of any State authority within its lawful bounds. And any such interference by the indirect means of taxation, is quite as much beyond the power of the national legislature, as if the interference were direct and extreme.

We are not, therefore, at liberty to give weight either to the moderate amount of the tax, or to the solicitude manifested by Congress to exempt those cases more immediately concerning the State as a community. We are bound, of course, not to decide against the validity of any law, unless we are forced into a clear conviction of its conflicting with the Constitution. But the uniform decisions of the United States Supreme Court against the validity of any taxes which would destroy those immunities which are secured by the Constitution, seem to leave no room for doubt concerning the case before us. The courts of Indiana and Wisconsin have arrived at the same result. — *Warren v. Paul*, 22 Ind. 276; *Jones v. Keep*, 19 Wis. 369. The interference is not remote, but direct, and prevents any action whatever by the courts of justice in private suits, until the tax is paid. It makes this payment a condition of jurisdiction.

The stamp could not lawfully be required, and the decision of the court below, dismissing the case, and annulling the judgment for want of it, was erroneous, and should be reversed, with costs.

CHRISTIANCY, J., and COOLEY, J., concurred. MARTIN, CH. J., concurred in the result.

THE COLLECTOR v. DAY.

SUPREME COURT OF THE UNITED STATES. 1870.

[11 Wall. 113.]

ERROR to the Circuit Court for the District of Massachusetts; the case being thus: . . .

Congress, by certain statutes passed in 1861, '5, '6, and '7 (Statutes of the 30th of June, 1864, c. 173, § 116, 13 Stat. at Large, 281; of the 3d of March, 1865, c. 78, § 1; *Id.* 479; of the 13th of July, 1866, c. 184, § 9; 14 *Id.* 137; and of the 2d of March, 1867, c. 169, § 13; *Id.* 477). enacted that "There shall be levied, collected, and paid annually upon the gains, profits, and income of every person residing in the United States, . . . whether derived from any kind of property, rents, interest, dividends, or salaries, or from any profession, trade, employment, or vocation, carried on in the United States or elsewhere, or from any other source whatever, a tax of 5 per centum on the amount so derived, over \$1,000."

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CHAP. VII.]

THE COLLECTOR v. DAY.

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Under these statutes, one Buffington, collector of the internal revenue of the United States for the district, assessed the sum of \$61.50 upon the salary, in the years 1866 and 1867, of J. M. Day, as judge of the Court of Probate and Insolvency for the county of Barnstable, State of Massachusetts. The salary was fixed by law, and payable out of the treasury of the State. Day paid the tax under protest, and brought the action below to recover it. The case was submitted to the court below on an agreed statement of facts, upon which judgment was rendered for the plaintiff. The defendant brought the case here for review; the question being, of course, whether the United States can lawfully impose a tax upon the income of an individual derived from a salary paid him by a State as a judicial officer of that State.

Mr. Akerman, Attorney-General, and Mr. John C. Ropes (with a brief of Mr. Ropes), for the collector, plaintiff in error. Mr. Dwight Foster, contra.

MR. JUSTICE NELSON delivered the opinion of the court.

The case presents the question whether or not it is competent for Congress, under the Constitution of the United States, to impose a tax upon the salary of a judicial officer of a State?

In *Dobbins v. The Commissioners of Erie County*, 16 Peters, 435, it was decided that it was not competent for the legislature of a State to levy a tax upon the salary or emoluments of an officer of the United States. The decision was placed mainly upon the ground that the officer was a means or instrumentality employed for carrying into effect some of the legitimate powers of the government, which could not be interfered with by taxation or otherwise by the States, and that the salary or compensation for the service of the officer was inseparably connected with the office; that if the officer, as such, was exempt, the salary assigned for his support or maintenance while holding the office was also, for like reasons, equally exempt.

The cases of *McCulloch v. Maryland*, 4 Wheaton, 316, and *Weston v. Charleston*, 2 Peters, 449, were referred to as settling the principle that governed the case, namely, "that the State governments cannot lay a tax upon the constitutional means employed by the government of the Union to execute its constitutional powers." . . .

It is conceded in the case of *McCulloch v. Maryland*, that the power of taxation by the States was not abridged by the grant of a similar power to the government of the Union: that it was retained by the States, and that the power is to be concurrently exercised by the two governments; and also that there is no express constitutional prohibition upon the States against taxing the means or instrumentalities of the general government. But it was held, and we agree properly held, to be prohibited by necessary implication; otherwise, the States might impose taxation to an extent that would impair, if not wholly defeat, the operations of the Federal authorities when acting in their appropriate sphere.

These views, we think, abundantly establish the soundness of the

decision of the case of *Dobbins v. The Commissioners of Erie*, which determined that the States were prohibited, upon a proper construction of the Constitution, from taxing the salary or emoluments of an officer of the government of the United States. And we shall now proceed to show that, upon the same construction of that instrument, and for like reasons, that government is prohibited from taxing the salary of the judicial officer of a State.

It is a familiar rule of construction of the Constitution of the Union, that the sovereign powers vested in the State governments by their respective constitutions remained unaltered and unimpaired, except so far as they were granted to the government of the United States. That the intention of the framers of the Constitution in this respect might not be misunderstood, this rule of interpretation is expressly declared in the Tenth Article of the amendments, namely: "The powers not delegated to the United States are reserved to the States respectively, or, to the people." The government of the United States, therefore, can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication.

The general government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States within the limits of their powers not granted, or, in the language of the Tenth Amendment, "reserved," are as independent of the general government as that government within its sphere is independent of the States.

The relations existing between the two governments are well stated by the present Chief Justice in the case of *Lane County v. Oregon*, 7 Wallace, 76. "Both the States and the United States," he observed, "existed before the Constitution. The people, through that instrument, established a more perfect union, by substituting a national government, acting with ample powers directly upon the citizens, instead of the Confederate government, which acted with powers greatly restricted, only upon the States. But, in many of the articles of the Constitution, the necessary existence of the States, and within their proper spheres, the independent authority of the States, are distinctly recognized. To them nearly the whole charge of interior regulation is committed or left; to them, and to the people, all powers, not expressly delegated to the national government, are reserved." Upon looking into the Constitution, it will be found that but a few of the articles in that instrument could be carried into practical effect without the existence of the States.

Two of the great departments of the government, the executive and legislative, depend upon the exercise of the powers, or upon the people of the States. The Constitution guarantees to the States a republican form of government, and protects each against invasion or

domestic violence. Such being the separate and independent condition of the States in our complex system, as recognized by the Constitution, and the existence of which is so indispensable, that, without them, the general government itself would disappear from the family of nations, it would seem to follow, as a reasonable, if not a necessary consequence, that the means and instrumentalities employed for carrying on the operations of their governments, for preserving their existence, and fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired, should not be liable to be crippled, much less defeated, by the taxing power of another government, which power acknowledges no limits but the will of the legislative body imposing the tax. And, more especially, those means and instrumentalities which are the creation of their sovereign and reserved rights, one of which is the establishment of the judicial department, and the appointment of officers to administer their laws. Without this power, and the exercise of it, we risk nothing in saying that no one of the States under the form of government guaranteed by the Constitution could long preserve its existence. A despotic government might. We have said that one of the reserved powers was that to establish a judicial department; it would have been more accurate, and in accordance with the existing state of things at the time, to have said the power to maintain a judicial department. All of the thirteen States were in the possession of this power, and had exercised it at the adoption of the Constitution; and it is not pretended that any grant of it to the general government is found in that instrument. It is, therefore, one of the sovereign powers vested in the States by their constitutions, which remained unaltered and unimpaired, and in respect to which the State is as independent of the general government as that government is independent of the States.

The supremacy of the general government, therefore, so much relied on in the argument of the counsel for the plaintiff in error, in respect to the question before us, cannot be maintained. The two governments are upon an equality, and the question is whether the power "to lay and collect taxes" enables the general government to tax the salary of a judicial officer of the State, which officer is a means or instrumentality employed to carry into execution one of its most important functions, the administration of the laws, and which concerns the exercise of a right reserved to the States?

We do not say the mere circumstance of the establishment of the judicial department, and the appointment of officers to administer the laws, being among the reserved powers of the State, disables the general government from levying the tax, as that depends upon the express power "to lay and collect taxes," but it shows that it is an original inherent power never parted with, and, in respect to which, the supremacy of that government does not exist, and is of no importance in determining the question; and further, that being an original and reserved power, and the judicial officers appointed under it being

a means or instrumentality employed to carry it into effect, the right and necessity of its unimpaired exercise, and the exemption of the officer from taxation by the general government stand upon as solid a ground, and are maintained by principles and reasons as cogent, as those which led to the exemption of the Federal officer in *Dobbins v. The Commissioners of Erie* from taxation by the State; for, in this respect, that is, in respect to the reserved powers, the State is as sovereign and independent as the general government. And if the means and instrumentalities employed by that government to carry into operation the powers granted to it are, necessarily, and, for the sake of self-preservation, exempt from taxation by the States, why are not those of the States depending upon their reserved powers, for like reasons, equally exempt from Federal taxation? Their unimpaired existence in the one case is as essential as in the other. It is admitted that there is no express provision in the Constitution that prohibits the general government from taxing the means and instrumentalities of the States, nor is there any prohibiting the States from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government. Of what avail are these means if another power may tax them at discretion?

But we are referred to the *Veazie Bank v. Fenno*, 8 Wallace, 533, in support of this power of taxation. That case furnishes a strong illustration of the position taken by the Chief Justice in *McCulloch v. Maryland*, namely, "That the power to tax involves the power to destroy."

The power involved was one which had been exercised by the States since the foundation of the government, and had been, after the lapse of three-quarters of a century, annihilated from excessive taxation by the general government, just as the judicial office in the present case might be, if subject at all to taxation by that government. But, notwithstanding the sanction of this taxation by a majority of the court, it is conceded, in the opinion, that "the reserved rights of the States, such as the right to pass laws: to give effect to laws through executive action; to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of State government, are not proper subjects of the taxing power of Congress." This concession covers the case before us, and adds the authority of this court in support of the doctrine which we have endeavored to maintain.

Judgment affirmed.

MR. JUSTICE BRADLEY, dissenting.

I dissent from the opinion of the court in this case, because it seems to me that the general government has the same power of taxing the income of officers of the State governments as it has of taxing that of its own officers. It is the common government of all alike;

and every citizen is presumed to trust his own government in the matter of taxation. No man ceases to be a citizen of the United States by being an officer under the State government. I cannot accede to the doctrine that the general government is to be regarded as in any sense foreign or antagonistic to the State governments, their officers, or people; nor can I agree that a presumption can be admitted that the general government will act in a manner hostile to the existence or functions of the State governments, which are constituent parts of the system or body politic forming the basis on which the general government is founded. The taxation by the State governments of the instruments employed by the general government in the exercise of its powers, is a very different thing. Such taxation involves an interference with the powers of a government in which other States and their citizens are equally interested with the State which imposes the taxation. In my judgment, the limitation of the power of taxation in the general government, which the present decision establishes, will be found very difficult of control. Where are we to stop in enumerating the functions of the State governments which will be interfered with by Federal taxation? If a State incorporates a railroad to carry out its purposes of internal improvement, or a bank to aid its financial arrangements, reserving, perhaps, a percentage on the stock or profits, for the supply of its own treasury, will the bonds or stock of such an institution be free from Federal taxation? How can we now tell what the effect of this decision will be? I cannot but regard it as founded on a fallacy, and that it will lead to mischievous consequences. I am as much opposed as any one can be to any interference by the general government with the just powers of the State governments. But no concession of any of the just powers of the general government can easily be recalled. I, therefore, consider it my duty to at least record my dissent when such concession appears to be made. An extended discussion of the subject would answer no useful purpose.

RAILROAD COMPANY v. PENISTON.

SUPREME COURT OF THE UNITED STATES. 1873.

[18 Wall. 5.]

APPEAL from the Circuit Court for the District of Nebraska; the case being thus:

By Act of Congress of July 1st, 1862 (12 Stat. at Large, 489), entitled "An Act to aid in the Construction of a Railroad and Telegraph Line from the Mississippi River to the Pacific Ocean, and to secure the Government the Use of the same for Postal, Military, and other Purposes," Congress incorporated certain individuals, their associates

had been chartered by Congress. This action is as to see the collection of the tax. Will the exemption of the agencies from state taxation is dependent not on

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and successors, as the "Union Pacific Railroad Company," with authority to build a continuous railroad and telegraph from a point on the one hundredth meridian to the western boundary of Nevada Territory. The Act fixed the amount of the capital stock and shares, and declared that "the stockholders should constitute said body politic and corporate." The government had no stock in the road, though through the President of the United States it was to appoint two directors, not stockholders, out of fifteen, which the charter provided for as the number to be appointed in all. Annual reports were to be made to the Secretary of the Treasury. The Act granted to the company the right of way through the public lands, and "for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and the public stores thereon," made to it an extensive grant of lands, and provided for the issuing of patents therefor. And for the same purposes the United States agreed to, and did issue its 6 per cent bonds, payable in thirty years, to the company, to the amount of \$16,000 per mile, for each section of forty miles; which bonds the original Act declared "shall, *ipso facto*, constitute a first mortgage on the whole of the railroad and telegraph, together with the rolling stock, fixtures, and property of every kind," and made specific provision as to proceedings on the failure of the company to redeem the bonds. By an Act of July 2d, 1864 (13 Stat. at Large, 356), this was changed, and the company authorized to issue its "first mortgage bonds to an amount not exceeding the bonds of the United States," and the lien of the bonds of the United States was declared to be subordinate to the bonds so issued by the company, with the exception relating to the transportation of despatches, troops, mails, &c., for the government.

The grants to the company were declared by the original Act to be made upon condition that the company shall (1) pay the bonds of the United States at maturity; (2) keep their line and road in repair and use; (3) "transmit despatches over said telegraph line, and transport mails, troops, and munitions of war, supplies, and public stores upon said railroad for the government," &c., giving the government the preference at fair and reasonable rates of compensation, not exceeding those charged to private individuals, the amount thus earned to be applied in payment of the bonds, as well as 5 per cent of the net earnings of the road after its completion.

By the seventeenth section of the same Act it was provided that if the road, when finished, should for any unreasonable time be permitted to remain out of repair, or unfit for use, Congress should have authority to put the same in repair and use, and from the income of the road reimburse the government for expenditures thus caused.

The eighteenth section provided that when the net earnings of the road should exceed 10 per cent of its cost, Congress might reduce, fix, and regulate rates of fare thereon, and declared that "the better

taxation in prop. In all these cases we have the general statement applied that was laid down in *McCulloch v. Md.*

to accomplish the object of this Act, to wit, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure the government at all times (but particularly in times of war) the use and benefits of the same for postal, military, and other purposes, Congress may at any time, having due regard for the rights of said companies named herein, add to, alter, amend, or repeal this Act."

The Act also contained provisions that so far as the public and government were concerned, the railroad and branches should be worked as one connected and continuous line.

There was no provision, in any Act of Congress relating to this company, respecting the taxation of it or its property by the States through which its roads might run.

The road was completed and put in operation in May, 1869, and with the Central Pacific Railroad formed a continuous line from the Missouri River and the Eastern States to California and the Pacific, thus uniting the extremities of the country. At the time of granting the charter, the territory over which this line was projected all belonged to the United States. But Nevada was admitted into the Union as a State in 1864, and Nebraska in 1867, and the road, as constructed, crosses the latter State in its whole breadth, from east to west. . . .

The authorities of Lincoln County, in the State of Nebraska, under a revenue law of the State, passed on the same 15th of February, 1869, laid a tax upon the property of the railroad company, embraced within the taxation, upon the valuation of \$16,000 per mile, for a length of one hundred and seventy-six miles.¹ The property of the company thus rated and taxed consisted of its road-bed, depots, wood-stations, water-stations, and other realty; telegraph-poles, telegraph-wires, bridges, boats, books, papers, office furniture and fixtures, money and credits, movable property, engines, &c. . . .

In this state of things, one Peniston, treasurer of Lincoln County, being about to collect the tax laid, the Union Pacific Railroad Company filed a bill in the Circuit Court of the United States in the District of Nebraska against him, to restrain his doing so. . . .

The cause was heard upon pleadings and agreed proofs, and the Circuit Court refused to restrain the collection of the tax against the one hundred and seventy-six miles of the road, holding the same to have been lawfully imposed, and the property of the company to be open to State taxation. . . .

Mr. W. M. Evarts, for the appellant. Mr. J. M. Woolworth, contra.

MR. JUSTICE STRONG. . . . There are, we admit, certain subjects of taxation which are withdrawn from the power of the States, not by

¹ The tax was, in fact, laid on two hundred and forty-six miles; but, as it was admitted by the defendant that there was seventy miles of excessive computation, the only question here was as to the tax on the remaining one hundred and seventy-six miles.

know how bad a guardian of Federal rights the Congress is it would seem better to say it is for Congress than the Courts to interfere

any direct or express provision of the Federal Constitution, but by what may be regarded as its necessary implications. They grow out of our complex system of government, and out of the fact that the authority of the national government is legitimately exercised within the States. While it is true that government cannot exercise its power of taxation so as to destroy the State governments, or embarrass their lawful action, it is equally true that the States may not levy taxes the direct effect of which shall be to hinder the exercise of any powers which belong to the national government. The Constitution contemplates that none of those powers may be restrained by State legislation. But it is often a difficult question whether a tax imposed by a State does in fact invade the domain of the general government, or interfere with its operations to such an extent, or in such a manner as to render it unwarranted. It cannot be that a State tax which remotely affects the efficient exercise of a Federal power is for that reason alone inhibited by the Constitution. To hold that would be to deny to the States all power to tax persons or property. Every tax levied by a State withdraws from the reach of Federal taxation a portion of the property from which it is taken, and to that extent diminishes the subject upon which Federal taxes may be laid. The States are, and they must ever be, coexistent with the national government. Neither may destroy the other. Hence the Federal Constitution must receive a practical construction. Its limitations and its implied prohibitions must not be extended so far as to destroy the necessary powers of the States, or prevent their efficient exercise.

These observations are directly applicable to the case before us. It is insisted on behalf of the plaintiffs that the tax of which they complain has been laid upon an agent of the general government constituted and organized as an instrument to carry into effect the powers vested in that government by the Constitution, and it is claimed that such an agency is not subject to State taxation. That the Union Pacific Railroad Company was created to subserve, in part at least, the lawful purposes of the national government; that it was authorized to construct and maintain a railroad and telegraph line along the prescribed route, and that grants were made to it, and privileges conferred upon it, upon condition that it should at all times transmit despatches over its telegraph line, and transport mails, troops, and munitions of war, supplies and public stores, upon the railroad for the government, whenever required to do so by any department thereof, and that the government should at all times have the preference in the use of the same for all the purposes aforesaid, must be conceded. Such are the plain provisions of its charter. So it was provided that in case of the refusal or failure of the company to redeem the bonds advanced to it by the government, or any part of them, when lawfully required by the Secretary of the Treasury, the road, with all the rights, functions, immunities, and appurtenances thereunto belonging, and also all lands granted to the company by the United States which

that this form should be applied" - Thayer

at the time of the default should remain in the ownership of the company, might be taken possession of by the Secretary of the Treasury for the use and benefit of the United States. The charter also contains other provisions looking to a supervision and control of the road and telegraph line, with the avowed purpose of securing to the government the use and benefit thereof for postal and military purposes. It is unnecessary to mention these in detail. They all look to a purpose of Congress to secure an agency competent and under obligation to perform certain offices for the general government. Notwithstanding this, the railroad and the telegraph line are neither in whole nor in part the property of the government. The ownership is in the complainants, a private corporation, though existing for the performance of public duties. The government owns none of its stock, and though it may appoint two of the directors, the right thus to appoint is plainly reserved for the sole purpose of enabling the enforcement of the engagements which the company assumed, the engagements to which we have already alluded.

Admitting, then, fully, as we do, that the company is an agent of the general government, designed to be employed, and actually employed, in the legitimate service of the government, both military and postal, does it necessarily follow that its property is exempt from State taxation?

In *Thomson v. The Union Pacific Railway Company* (9 Wall. 579), after much consideration, we held that the property of that company was not exempt from State taxation, though their railroad was part of a system of roads constructed under the direction and authority of the United States, and largely for the uses and purposes of the general government. . . . There is no difference which can be pointed out between the nature, extent, or purposes of their agency and those of the corporation complainants in the present case. Yet, as we have said, a State tax upon the property of the company, its road-bed, rolling-stock, and personalty in general, was ruled by this court not to be in conflict with the Federal Constitution. It may, therefore, be considered as settled that no constitutional implications prohibit a State tax upon the property of an agent of the government merely because it is the property of such an agent. A contrary doctrine would greatly embarrass the States in the collection of their necessary revenue without any corresponding advantage to the United States. A very large proportion of the property within the States is employed in execution of the powers of the government. It belongs to governmental agents, and it is not only used, but it is necessary for their agencies. United States mails, troops, and munitions of war are carried upon almost every railroad. Telegraph lines are employed in the national service. So are steamboats, horses, stage-coaches, foundries, ship-yards, and multitudes of manufacturing establishments. They are the property of natural persons, or of corporations, who are instruments or agents

of the general government, and they are the hands by which the objects of the government are attained. Were they exempt from liability to contribute to the revenue of the States it is manifest the State governments would be paralyzed. While it is of the utmost importance that all the powers vested by the Constitution of the United States in the general government should be preserved in full efficiency, and while recent events have called for the most unembarrassed exercise of many of those powers, it has never been decided that State taxation of such property is impliedly prohibited.

It is, however, insisted that the case of *Thomson v. The Union Pacific Railroad Company* differs from the case we have now in hand in the fact that it was incorporated by the Territorial Legislature and the Legislature of the State of Kansas, while these complainants were incorporated by Congress. We do not perceive that this presents any reason for the application of a rule different from that which was applied in the former case. It is true that, in the opinion delivered by the Chief Justice, reference was made to the fact that the defendants were a State corporation, and an argument was attempted to be drawn from this to distinguish the case from *McCulloch v. The State of Maryland* (4 Wheaton, 316). But when the question is, as in the present case, whether the taxation of property is taxation of means, instruments, or agencies by which the United States carries out its powers, it is impossible to see how it can be pertinent to inquire whence the property originated, or from whom its present owners obtained it. The United States have no more ownership of the road authorized by Congress than they had in the road authorized by Kansas. If the taxation of either is unlawful, it is because the States cannot obstruct the exercise of national powers. As was said in *Weston v. Charleston* (2 Peters, 467), they cannot, by taxation or otherwise, "retard, impede, burden, or in any manner control the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government." The implied inhibition, if any exists, is against such obstruction, and that must be the same whether the corporation whose property is taxed was created by Congress or by a State legislature.

Nothing, we think, in the past decisions of this court is inconsistent with the opinions we now hold. *McCulloch v. The State of Maryland* and *Osborn v. Bank of the United States* (9 Wheaton, 738) are much relied upon by the appellants, but an examination of what was decided in those cases will reveal that they are in full harmony with the doctrine that the property of an agent of the general government may be subjected to State taxation. In the former of those cases the tax held unconstitutional was laid upon the notes of the bank. The institution was prohibited from issuing notes at all except upon stamped paper furnished by the State, and to be paid for on delivery, the stamp upon each note being proportioned to its denomination. The tax, therefore, was not upon any property of the bank, but

upon one of its operations, in fact, upon its right to exist as created. It was a direct impediment in the way of a governmental operation performed through the bank as an agent. It was a very different thing, both in its nature and effect, from a tax on the property of the bank. No wonder, then, that it was held illegal. But even in that case the court carefully limited the effect of the decision. It does not extend, said the Chief Justice, to a tax paid by the real property of the bank, in common with the other real property in the State, nor to a tax imposed on the interest which the citizens of Maryland may hold in the institution, in common with the other property of the same description throughout the State. But this is a tax on the operations of the bank, and is, consequently, a tax on the operations of an instrument employed by the government of the Union to carry its powers into execution. Such a tax must be unconstitutional. Here is a clear distinction made between a tax upon the property of a government agent and a tax upon the operations of the agent acting for the government.

In *Osborn v. The Bank* the tax held unconstitutional was a tax upon the existence of the bank—upon its right to transact business within the State of Ohio. It was, as it was intended to be, a direct impediment in the way of those Acts which Congress, for national purposes, had authorized the bank to perform. For this reason the power of the State to direct it was denied, but at the same time it was declared by the court that the local property of the bank might be taxed, and, as in *McCulloch v. Maryland*, a difference was pointed out between a tax upon its property and one upon its action. In noticing an alleged resemblance between the bank and a government contractor, Chief Justice Marshall said: "Can a contractor for supplying a military post with provisions be restrained from making purchases within a State, or from transporting the provisions to the place at which the troops were stationed? Or could he be fined or taxed for doing so? We have not heard these questions answered in the affirmative. It is true the property of the contractor may be taxed; and so may the local property of the bank. But we do not admit that the act of purchasing, or of conveying the articles purchased, can be under State control." This distinction, so clearly drawn in the earlier decisions, between a tax on the property of a governmental agent, and a tax upon the action of such agent, or upon his right to be, has ever since been recognized. All State taxation which does not impair the agent's efficiency in the discharge of his duties to the government has been sustained when challenged, and a tax upon his property generally has not been regarded as beyond the power of a State to impose. In *National Bank v. The Commonwealth of Kentucky* (9 Wallace, 353), when the right to tax national banks was under consideration, it was asserted by us that the doctrine cannot be maintained that banks, or other corporations or instrumentalities of the government, are to be wholly withdrawn from the operation of State legislation. Yet it was

conceded that the agencies of the Federal government are uncontrollable by State legislation, so far as it may interfere with, or impair their efficiency in performing the functions by which they are designed to serve that government.

It is, therefore, manifest that exemption of Federal agencies from State taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform. A tax upon their operations is a direct obstruction to the exercise of Federal powers.

In this case the tax is laid upon the property of the railroad company precisely as was the tax complained of in *Thomson v. Union Pacific*. It is not imposed upon the franchises or the right of the company to exist and perform the functions for which it was brought into being. Nor is it laid upon any act which the company has been authorized to do. It is not the transmission of despatches, nor the transportation of United States mails, or troops, or munitions of war, that is taxed, but it is exclusively the real and personal property of the agent, taxed in common with all other property in the State of a similar character. It is impossible to maintain that this is an interference with the exercise of any power belonging to the general government, and if it is not, it is prohibited by no constitutional implication.

It remains only to notice one other position taken by the complainants. It is that if the Act of the State under which the tax was laid be constitutional in its application to their property within Lincoln County, the property outside of Lincoln County is not lawfully taxable by the authorities of that county under the laws of the State. To this we are unable to give our assent. By the statutes of Nebraska the unorganized territory west of Lincoln County, and the unorganized county of Cheyenne, are attached to the county of Lincoln for judicial and revenue purposes. The authorities of that county, therefore, were the proper authorities to levy the tax upon the property thus placed under their charge for revenue purposes.

The decree of the Circuit Court is affirmed.

[SWAYNE, J., gave a brief concurring opinion. BRADLEY, FIELD, and HUNT, JJ., dissented, BRADLEY, J., giving an opinion, in which FIELD, J., concurred.]

IN *West. Un. Tel. Co. v. Mass.*, 125 U. S. 530 (1887), on appeal from the United States Circuit Court for Massachusetts, MILLER, J., for the court, said: "The main ground on which the telegraph company resisted the payment of the tax alleged to be due, and on which prob-

ably the case was removed from the State court into the Circuit Court of the United States, is that it is a violation of the rights conferred on the company by the Act of July 24, 1866, now Title LXV., §§ 5263 to 5269 of the Revised Statutes. The defendant alleges that it had accepted the provisions of that law, and filed a notification of such acceptance with the Postmaster-General of the United States, June 8, 1867. The argument is, therefore, that by virtue of § 5263 the company has a right to exercise its functions of telegraphing over so much of its lines as is connected with the military and post roads of the United States which have been declared to be such by law, without being subject to taxation therefor by the State authorities. That section reads as follows:—

“‘SEC. 5263. Any telegraph company now organized, or which may hereafter be organized under the laws of any State, shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post-roads of the United States which have been or may hereafter be declared such by law, and over, under, or across the navigable streams or waters of the United States; but such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post-roads.’

“It is urged that this section, upon its acceptance by this corporation or any of like character, confers a right to do the business of telegraphing which is transacted over the lines so constructed over or along such post-roads, without liability to taxation by the State. The argument is very much pressed that it is a tax upon the franchise of the company, which franchise being derived from the United States by virtue of the statute above recited cannot be taxed by a State, and counsel for appellant occasionally speak of the tax authorized by the law of Massachusetts upon this as well as all other corporations doing business within its territory, whether organized under its laws or not, as a tax upon their franchises. But by whatever name it may be called, as described in the laws of Massachusetts, it is essentially an excise upon the capital of the corporation. The laws of that Commonwealth attempt to ascertain the just amount which any corporation engaged in business within its limits shall pay as a contribution to the support of its government upon the amount and value of the capital so employed by it therein.

“The telegraph company, which is the defendant here, derived its franchise to be a corporation and to exercise the function of telegraphing from the State of New York. It owes its existence, its capacity to contract, its right to sue and be sued, and to exercise the business of telegraphy, to the laws of the State under which it is organized. But the privilege of running the lines of its wires ‘through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States, . . . and over,

under, or across the navigable streams or waters of the United States,' is granted to it by the Act of Congress. This, however, is merely a permissive statute, and there is no expression in it which implies that this permission to extend its lines along roads not built or owned by the United States, or over and under navigable streams, or over bridges not built or owned by the Federal government, carries with it any exemption from the ordinary burdens of taxation.

"While the State could not interfere by any specific statute to prevent a corporation from placing its lines along these post-roads, or stop the use of them after they were placed there, nevertheless the company receiving the benefit of the laws of the State for the protection of its property and its rights is liable to be taxed upon its real or personal property as any other person would be. It never could have been intended by the Congress of the United States, in conferring upon a corporation of one State the authority to enter the territory of any other State and erect its poles and lines therein, to establish the proposition that such a company owed no obedience to the laws of the State into which it thus entered, and was under no obligation to pay its fair proportion of the taxes necessary to its support. . . . [Here follows a statement of *Tel. Co. v. Texas*, 105 U. S. 460:] If the principle now contended for be sound, every railroad in the country should be exempt from taxation because they have all been declared to be post-roads; and the same reasoning would apply with equal force to every bridge and navigable stream throughout the land. . . . [Here follows a statement of *R. R. Co. v. Peniston*, 18 Wall. 5; *Thomson v. Pac. R. R. Co.*, 9 Wall. 579, and *Nat. Bk. v. Com.*, 9 Wall. 353.] The tax in the present case, though nominally upon the shares of the capital stock of the company, is in effect a tax upon that organization on account of property owned and used by it in the State of Massachusetts, and the proportion of the length of its lines in that State to their entire length throughout the whole country is made the basis for ascertaining the value of that property. We do not think that such a tax is forbidden by the acceptance on the part of the telegraph company of the rights conferred by § 5263 of the Revised Statutes, or by the commerce clause of the Constitution.

"It is urged against this tax that in ascertaining the value of the stock no deduction is made on account of the value of real estate and machinery situated and subject to local taxation outside of the Commonwealth of Massachusetts. The report of Examiner Fiske, to whom the matter was referred to find the facts, states that the amount of the value of said real estate outside of its jurisdiction was not clearly shown, but it did appear that the cost of land and buildings belonging to the company and entirely without that State was over three millions of dollars. In the statement of the treasurer of the company it is said that the value of real estate owned by the company within the State of Massachusetts was nothing. Since the corporation was only taxed for that proportion of its shares of capital stock which was sup-

the total mileage. So Mass. really taxed much more than was within the state

posed to be taxable in that State on the calculation above referred to, and since no real estate of the corporation was owned or taxed within its limits, we do not see why any deduction should be made from the proportion of the capital stock which is taxed by its authorities. But if this were otherwise we do not feel called upon to defend all the items and rules by which they arrived at the taxable value on which its ratio of percentage of taxation should be assessed; and even in this case, which comes from the Circuit Court and not from that of the State, we think it should appear that the corporation is injured by some principle or rule of the law not equally applicable to other objects of taxation of like character. Since, therefore, this statute of Massachusetts is intended to govern the taxation of all corporations therein, and doing business within its territory, whether organized under its own laws or those of some other State, and since the principle is one which we cannot pronounce to be an unfair or an unjust one, we do not feel called upon to hold the tax void, because we might have adopted a different system had we been called upon to accomplish the same result.

"It is very clear to us, when we consider the limited territorial extent of Massachusetts, and the proportion of the length of the lines of this company in that State to its business done therein, with its great population and business activity, that the rule adopted to ascertain the amount of the value of the capital engaged in that business within its boundaries, on which the tax should be assessed, is not unfavorable to the corporation, and that the details of the method by which this was determined have not exceeded the fair range of legislative discretion. We do not think that it follows necessarily, or as a fair argument from the facts stated in the case, that there was injustice in the assessment for taxation.

"The result of these views is, that the tax assessed against the plaintiff in error is a valid tax; that the judgment of the court below, 'that the sum claimed by the plaintiff (below) to be due for taxes, to wit, \$10,618.46, be paid to said State by said corporation, with interest thereon,' is without error, and so much of said judgment is hereby affirmed.

"The decree or judgment, however, proceeds and awards an injunction against the company. . . .

"The effect of this injunction, if obeyed, is to utterly suspend the business of the telegraph company, and defeat all its operations within the State of Massachusetts. The Act of Congress says that the company accepting its provisions 'shall have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post-roads of the United States.' It is found in this case that 2334.55 miles of the company's lines, out of 2833.05 on which this tax is assessed, are along and over such post-roads, and of course

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the injunction prohibits the operation of the defendant's telegraph over these lines, nearly all it has in the State.

"If the Congress of the United States had authority to say that the company might construct and operate its telegraph over these lines, as we have repeatedly held it had, the State can have no authority to say it shall not be done. The injunction in this case, though ordered by a Circuit Court of the United States, is only granted by virtue of section 54 of chapter 13 of the Public Statutes of Massachusetts. If this statute is void, as we think it is, so far as it prescribes this injunction as a remedy to enforce the collection of its taxes by the decree of the court awarding it, the injunction is erroneous.

"In holding this portion of section 54 of chapter 13 of the Massachusetts statutes to be void as applicable to this case, we do not deprive the State of the power to assess and collect the tax. If a resort to a judicial proceeding to collect it is deemed expedient, there remains to the court all the ordinary means of enforcing its judgment — executions, sequestration, and any other appropriate remedy in chancery."¹

In *California v. Central Pacific R. R. Co.*, 127 U. S. 1, 38 (1888), six cases, affecting three different railroads as defendants, were considered together. The defendants denied the constitutionality of certain taxation under the laws of California, and, among other defences, set up that they enjoyed franchises conferred by the United States, not taxable without the assent of Congress. In holding the assessments void, the court (BRADLEY, J.), said: "If we turn to the Acts of Congress referred to by the court, we shall find that franchises of the most important character were conferred on this company. Originally, the Central Pacific Railroad Company of California had only power to construct a railroad from Sacramento to the eastern boundary of the State. Congress, by the Act of 1862, authorized the company (in the words of the Act) 'to construct a railroad and telegraph line from the Pacific coast, at or near San Francisco, or the navigable waters of the Sacramento River, to the eastern boundary of California, upon the same terms and conditions, in all respects, as are contained in this Act for the construction of said railroad and telegraph line first mentioned [the Union Pacific], and to meet and connect with the first mentioned railroad and telegraph line on the eastern boundary of California.' Sec. 9. In the following section it was enacted, that, after the completion of its road to the eastern boundary of California, the Central Pacific might unite upon equal terms with the Union Pacific Railroad Company in constructing so much of said railroad and telegraph line and branch railroads and telegraph lines through the Territories, from the State of California to the Missouri River, as should then remain to be constructed, on the same terms and conditions as provided in rela-

¹ See *Miller, J.*, in *Ruttenberg v. W. U. Tel. Co.*, 127 U. S. 411, 426; *Chesand, &c. Ry. Co. v. Backus*, 154 U. S. 439; *Com. v. Stand. Oil Co.*, 101 Pa. 119 (1882). — Ed.

goes this far: all federal franchises are exempt from taxation; because Fed. govt. has power to supersede sts. for federal purposes.

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tion to the Union Pacific Railroad Company. Thus, without referring to the other franchises and privileges conferred upon this company, the fundamental franchise was given by the Acts of 1862 and the subsequent Acts, to construct a railroad from the Pacific Ocean across the State of California and the Federal Territories until it should meet the Union Pacific; which it did meet at Ogden in the Territory of Utah. This important grant, though in part collateral to, was independent of, that made to the company by the State of California, and has ever since been possessed and enjoyed. The present company has it by transfer from, and consolidation of, the original companies, by which its existence and capacities were constituted. Such consolidation was authorized by the 16th section of the Act of Congress of July 1st, 1862, and the 16th section of the Act of July 2d, 1864, taken in connection with the 2d section of the Act of March 3d, 1865, referred to in the findings of the court. The last named Act ratified the transfer by the Central Pacific to the Western Pacific of a portion of its road extending from San José to Sacramento, and conferred upon the latter company all the privileges and benefits of the several Acts of Congress relating thereto, and subject to all the conditions thereof. If, therefore, the Central Pacific Railroad Company is not a Federal corporation, its most important franchises, including that of constructing a railroad from the Pacific Ocean to Ogden city, were conferred upon it by Congress.

"It cannot at the present day be doubted that Congress, under the power to regulate commerce among the several States, as well as to provide for postal accommodations and military exigencies, had authority to pass these laws. The power to construct, or to authorize individuals or corporations to construct, national highways and bridges from State to State, is essential to the complete control and regulation of interstate commerce. Without authority in Congress to establish and maintain such highways and bridges, it would be without authority to regulate one of the most important adjuncts of commerce. This power in former times was exerted to a very limited extent, the Cumberland or National road being the most notable instance. Its exertion was but little called for, as commerce was then mostly conducted by water, and many of our statesmen entertained doubts as to the existence of the power to establish ways of communication by land. But since, in consequence of the expansion of the country, the multiplication of its products, and the invention of railroads and locomotion by steam, land transportation has so vastly increased, a sounder consideration of the subject has prevailed and led to the conclusion that Congress has plenary power over the whole subject. Of course the authority of Congress over the Territories of the United States, and its power to grant franchises exercisable therein, are, and ever have been, undoubted. But the wider power was very freely exercised, and much to the general satisfaction, in the creation of the vast system of railroads connecting the East with the Pacific, traversing States as well as Territories, and employing the agency of State as well as Federal

corporations. See *Pacific Railroad Removal Cases*, 115 U. S. 1, 14, 18.

Assuming, then, that the Central Pacific Railroad Company has received the important franchises referred to by grant of the United States, the question arises whether they are legitimate subjects of taxation by the State. They were granted to the company for national purposes and to subserve national ends. It seems very clear that the State of California can neither take them away, nor destroy nor abridge them, nor cripple them by onerous burdens. Can it tax them? It may undoubtedly tax outside visible property of the company, situated within the State. That is a different thing. But may it tax franchises which are the grant of the United States? In our judgment, it cannot. What is a franchise? Under the English law Blackstone defines it as 'a royal privilege, or branch of the king's prerogative, subsisting in the hands of a subject.' 2 Bl. Com. 37. Generalized, and divested of the special form which it assumes under a monarchical government based on feudal traditions, a franchise is a right, privilege or power of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration, either by the government directly, or by public agents, acting under such conditions and regulations as the government may impose in the public interest, and for the public security. Such rights and powers must exist under every form of society. They are always educed by the laws and customs of the community. Under our system, their existence and disposal are under the control of the legislative department of the government, and they cannot be assumed or exercised without legislative authority. No private person can establish a public highway, or public ferry, or railroad, or charge tolls for the use of the same, without authority from the legislature, direct or derived. These are franchises. No private person can take another's property, even for a public use, without such authority; which is the same as to say, that the right of eminent domain can only be exercised by virtue of a legislative grant. This is a franchise. No persons can make themselves a body corporate and politic without legislative authority. Corporate capacity is a franchise. The list might be continued indefinitely.

In view of this description of the nature of a franchise, how can it be possible that a franchise granted by Congress can be subject to taxation by a State without the consent of Congress? Taxation is a burden, and may be laid so heavily as to destroy the thing taxed, or render it valueless. As Chief Justice Marshall said in *McCulloch v. Maryland*, 'the power to tax involves the power to destroy.' Recollecting the fundamental principle that the Constitution, laws and treaties of the United States are the supreme law of the land, it seems to us almost absurd to contend that a power given to a person or corporation by the United States may be subjected to taxation by a State. The power conferred emanates from, and is a portion of, the power of the government that confers it. To tax it, is not only derogatory to

the dignity, but subversive of the powers of the government, and repugnant to its paramount sovereignty. It is unnecessary to cite cases on this subject. The principles laid down by this court in *McCulloch v. Maryland*, 4 Wheat. 316; *Osborn v. The Bank of the United States*, 9 Wheat. 738; and *Brown v. Maryland*, 12 Wheat. 419; and in numerous cases since which have followed in their lead, abundantly sustain the views we have expressed. It may be added that these views are not in conflict with the decisions of this court in *Thomson v. Pacific Railroad*, 9 Wall. 579, and *Railroad Co. v. Peniston*, 18 Wall. 5. As explained in the opinion of the court in the latter case, the tax there was upon the property of the company and not upon its franchises or operations. 18 Wall. 35, 37.

"The taxation of a corporate franchise merely as such, unless pursuant to a stipulation in the original charter of the company, is the exercise of an authority somewhat arbitrary in its character. It has no limitation but the discretion of the taxing power. The value of the franchise is not measured like that of property, but may be ten thousand or ten hundred thousand dollars, as the legislature may choose. Or, without any valuation of the franchise at all, the tax may be arbitrarily laid. It is not an idle objection, therefore, made by the company against the tax imposed in the present cases. . . .

"It follows that in each one of the cases now before us, the assessment made by the State Board of Equalization comprised the value of franchises or property which the board was prohibited by the Constitution of the State or of the United States from including therein; and that these values are so blended with the other items of which the assessment is composed that they cannot be separated therefrom. The assessments are, therefore, void."¹

In *Wisc. Cent. R. R. Co. v. Price County*, 133 U. S. 496 (1889), the Supreme Court (FIELD, J.), in holding that certain lands were not subject to taxation as the plaintiff's property, said: "It is familiar law that a State has no power to tax the property of the United States within its limits. This exemption of their property from State taxation—and by State taxation we mean any taxation by authority of the State, whether it be strictly for State purposes or for mere local and special objects—is founded upon that principle which inheres in every independent government, that it must be free from any such interference of another government as may tend to destroy its powers or impair their efficiency. If the property of the United States could be subjected to taxation by the State, the object and extent of the taxation would be subject to the State's discretion. It might extend to buildings and other property essential to the discharge of the ordinary business of the national government, and in the enforcement of the tax those

¹ And so *San Francisco v. W. U. Tel. Co.*, 96 Cal. 140 (1892); *Com. v. Westinghouse Co.*, 151 Pa. 265 (1892), where the capital stock was partly invested in patent rights.—Ed.

to destroy its powers or impair their efficiency.

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buildings might be taken from the possession and use of the United States. The Constitution vests in Congress the power to 'dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.' And this implies an exclusion of all other authority over the property which could interfere with this right or obstruct its exercise. *Van Brocklin v. State of Tennessee*, 117 U. S. 151, 168.¹

"This doctrine of exemption from taxation of the property of the United States, so far as lands are concerned, is in express terms affirmed in the Constitution of Wisconsin, which ordains that the State 'shall never interfere with the primary disposition of the soil within the same by the United States, nor with any regulations Congress may find necessary for securing the title in such soil to *bona fide* purchasers thereof; and no tax shall be imposed on land the property of the United States.' Constitution of 1848, Art. II., sec. 2.

"It follows that all the public domain of the United States within the State of Wisconsin was in 1883 exempt from State taxation. Usually the possession of the legal title by the government determines both the fact and the right of ownership. There is, however, an exception to this doctrine with respect to the public domain, which is as well settled as the doctrine itself, and that is, that where Congress has prescribed the conditions upon which portions of that domain may be alienated, and provided that upon the performance of the conditions a patent of the United States shall issue to the donee or purchaser, and all such conditions are complied with, the land alienated being distinctly defined, it only remaining for the government to issue its patent, and until such issue holding the legal title in trust for him, who in the meantime is not excluded from the use of the property—in other words, when the government has ceased to hold any such right or interest in the property as to justify it in withholding a patent from the donee or purchaser, and it does not exclude him from the use of the property—then the donee or purchaser will be treated as the beneficial owner of the land, and the same be held subject to taxation as his property. This exception to the general doctrine is founded upon the principle that he who has the right to property, and is not excluded from its enjoyment, shall not be permitted to use the legal title of the government to avoid his just share of State taxation.

"Thus, in *Carroll v. Safford*, 3 How. 441, 461, the complainant had entered certain lands belonging to the United States. in the local land office, paid for them the required price, and received from the office a land certificate. Patents were issued for them, but, before their issue, the lands were assessed for taxation and sold for the taxes. The question whether they were subject to taxation by the State after their entry and before the patents were issued was answered in the affirmative. Said the court: 'When the land was purchased and paid for, it was no

¹ In this case a full and elaborate opinion (GRAY, J.) holds all property of the United States to be exempt from State taxation.—ED.

longer the property of the United States, but of the purchaser. He held for it a final certificate, which could no more be cancelled by the United States than a patent; and again: 'It is said the fee is not in the purchaser, but in the United States, until the patent shall be issued. This is so, technically, at law, but not in equity. The land in the hands of the purchaser is real estate, descends to his heirs, and does not go to his executors or administrators.' And again: 'Lands which have been sold by the United States can in no sense be called the property of the United States. They are no more the property of the United States than lands patented. So far as the rights of the purchaser are considered, they are protected under the patent certificate as fully as under the patent. Suppose the officers of the government had sold a tract of land, received the purchase money, and issued a patent certificate: can it be contended that they could sell it again, and convey a good title? They could no more do this than they could sell land a second time which had been previously patented. When sold, the government, until the patent shall issue, holds the mere legal title for the land in trust for the purchaser; and any second purchaser would take the land charged with the trust.'

"In *Witherspoon v. Duncan*, 4 Wall. 210, 218, a similar question arose and was in like manner answered. Said the court: 'In no just sense can lands be said to be public lands after they have been entered at the land office and a certificate of entry obtained. If public lands before the entry, after it they are private property. If subject to sale, the government has no power to revoke the entry and withhold the patent. A second sale, if the first was authorized by law, confers no right on the buyer, and is a void act;' and again: 'The contract of purchase is complete when the certificate of entry is executed and delivered, and thereafter the land ceases to be a part of the public domain. The government agrees to make proper conveyance as soon as it can, and in the meantime holds the naked legal fee in trust for the purchaser, who has the equitable title.' See, also, *Railway Co. v. Prescott*, 16 Wall. 603, 608; *Railway Co. v. McShane*, 22 Wall. 444, 461."

HOME INSURANCE COMPANY v. NEW YORK STATE. *in New*

SUPREME COURT OF THE UNITED STATES. 1889. *which is*

[134 U. S. 594.] *a tax up*

THE plaintiff in error, The Home Insurance Company of New York, *the fa*
is a corporation created under the laws of that State. Its capital *or bus*
stock during the year 1881 was three millions of dollars, divided into *of a*
thirty thousand shares of the par value of one hundred dollars each,
all fully paid. In the months of January and July of that year a divi-

by the extent of dividends on its capital stock, or u
no dividends, by the extent or value of capital st
during the year. The Home Ins Co had inve

dividend of \$150,000 was declared by the company, making together ten per cent upon the par value of its capital stock. A portion of that capital stock was invested in bonds of the United States, amounting, when the dividend was declared in July, 1881, and also on the first of November of that year, to \$1,940,000.

By an Act of the Legislature of New York, passed May 26, 1881, c. 361, amending a previous Act providing for the taxation of certain corporations, joint stock companies and associations, it was declared that every corporation, joint stock company or association, then or thereafter incorporated under any law of the State, or of any other State or country, and doing business in the State, with certain designated exceptions not material in this case, should be subject to a tax upon "its corporate franchise or business," to be computed as follows: if its dividend or dividends made or declared during the year ending the first day of November amount to six per cent or more upon the par value of its capital stock, then the tax to be at the rate of one-quarter mill upon the capital stock for each one per cent of the dividends. A less rate is provided where there is no dividend, or a dividend less than six per cent and also where the corporation, company or association has more than one kind of capital stock — as, for instance, common and preferred stock — and upon one of them there is a dividend amounting to six or more per cent and upon the other there is no dividend or a dividend of less than six per cent. The purpose of the Act is to fix the amount of the tax each year upon the franchise or business of the corporation by the extent of dividends upon its capital stock, or, where there are no dividends, according to the actual value of the capital stock during the year. We are concerned in this case, however, only with the tax where the amount is computed by the extent of the dividends.

The tax payable by the Home Insurance Company, estimated according to its dividends, under the above law of the State, aggregated \$7,500. The company resisted its payment, assuming that the tax was in fact levied upon the capital stock of the company, and contending that there should be deducted from it a sum bearing the same ratio thereto that the amount invested in bonds of the United States bears to its capital stock, and that the law requiring a tax without such reduction is unconstitutional and void. An agreed case was accordingly made up embodying a statement of the facts, between the company and the attorney-general of New York representing the State, and submitted to the Supreme Court of the State. That court gave judgment in favor of the State against the company, which on appeal to the Court of Appeals of the State was affirmed. 92 N. Y. 328. The judgment of the latter court, having been remitted to the Supreme Court and entered there, the case is brought to this court for review on writ of error.

Mr. Benjamin H. Bristow, for plaintiff in error. Mr. Charles F. Tabor, Attorney-General of the State of New York, for defendant in error.

corporate franchise. There was therefore no objection because part of the stock was invested in bonds. Law was also not objectionable to the 14th

MR. JUSTICE FIELD, after stating the case, delivered the opinion of the court.

The contention of the plaintiff in error is that the tax in question was levied upon its capital stock, and therefore invalid so far as the bonds of the United States constitute a part of that stock. If that contention were well founded there would be no question as to the invalidity of the tax. That the bonds or obligations of the United States for the payment of money cannot be the subject of taxation by a State is familiar law settled by numerous adjudications of this court. . . .

Looking now at the tax in this case upon the plaintiff in error, we are unable to perceive that it falls within the doctrines of any of the cases cited, to which we fully assent, not doubting their correctness in any particular. It is not a tax in terms upon the capital stock of the company, nor upon any bonds of the United States composing a part of that stock. The statute designates it a tax upon the "corporate franchise or business" of the company, and reference is only made to its capital stock and dividends for the purpose of determining the amount of the tax to be exacted each year.

By the term "corporate franchise or business," as here used, we understand is meant (not referring to corporations sole, which are not usually created for commercial business) the right or privilege given by the State to two or more persons of being a corporation, that is, of doing business in a corporate capacity, and not the privilege or franchise which, when incorporated, the company may exercise. The right or privilege to be a corporation, or to do business as such body, is one generally deemed of value to the corporators, or it would not be sought in such numbers as at present. It is a right or privilege by which several individuals may unite themselves under a common name and act as a single person, with a succession of members, without dissolution or suspension of business and with a limited individual liability. The granting of such right or privilege rests entirely in the discretion of the State, and, of course, when granted, may be accompanied with such conditions as its legislature may judge most befitting to its interests and policy. It may require, as a condition of the grant of the franchise, and also of its continued exercise, that the corporation pay a specific sum to the State each year, or month, or a specific portion of its gross receipts, or of the profits of its business, or a sum to be ascertained in any convenient mode which it may prescribe. The validity of the tax can in no way be dependent upon the mode which the State may deem fit to adopt in fixing the amount for any year which it will exact for the franchise. No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privileges it bestows. It may well seek in this way to increase its revenue to the extent to which it has been cut off by exemption of other property from taxation. As its revenues to meet its expenses are lessened in one direction, it may look to any other property as sources of revenue, which is

not exempted from taxation. Its action in this matter is not the subject of judicial inquiry in a Federal tribunal. As was said in *Delaware Railroad Tax Case*, 18 Wall. 206, 231 : “ The State may impose taxes upon the corporation as an entity existing under its laws, as well as upon the capital stock of the corporation or its separate corporate property. And the manner in which its value shall be assessed and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion. It is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the legislature of the State ; our only concern is with the validity of the tax ; all else lies beyond the domain of our jurisdiction.” It is true, as said by this court in *California v. Pacific Railroad Co.*, 127 U. S. 1, 41, that the taxation of a corporate franchise has no limitation but the discretion of the taxing power, and its value is not measured like that of property, but may be fixed at any sum that the legislature may choose ; it may be arbitrarily laid, without any valuation put upon the franchise. If any hardship or oppression is created by the amount exacted, the remedy must be sought by appeal to the legislature of the State ; it cannot be furnished by the Federal tribunals.

The tax in the present case would not be affected if the nature of the property in which the whole capital stock is invested were changed and put into real property or bonds of New York, or of other States. From the very nature of the tax, being laid upon a franchise given by the State, and revocable at pleasure, it cannot be affected in any way by the character of the property in which its capital stock is invested. The power of the State over the corporate franchise and the conditions upon which it shall be exercised, is as ample and plenary in the one case as in the other.

In some States the franchises and privileges of a corporation are declared to be personal property. Such was the case in New York with reference to the privileges and franchises of savings banks. They were so declared by a law passed in 1866, and made liable to taxation to an amount not exceeding the gross sum of the surplus earned and in the possession of the banks. The law was sustained by the Court of Appeals of the State in *Monroe Savings Bank v. City of Rochester*, 37 N. Y. 365, 369, 370, although the bank had a portion of its property invested in United States bonds. In its opinion the court observed that in declaring the privileges and franchises of a bank to be personal property the legislature adopted no novel principle of taxation ; that the powers and privileges which constitute the franchises of a corporation were in a just sense property, quite distinct and separate from the property which, by the use of such franchises, the corporation might acquire ; that they might be subjected to taxation if the legislature saw fit so to enact ; that such taxation being within the power of the legislature, it might prescribe a rule or test of their value ; that all franchises were not of equal value, their value depending, in some

instances, upon the nature of the business authorized, and the extent to which permission was given to multiply capital for its prosecution; and that the tax being upon the franchises and privileges, it was unimportant in what manner the property of the corporation was invested. And the court added: "It is true that where a State tax is laid upon the property of an individual or a corporation, so much of their property as is invested in United States bonds is to be treated, for the purposes of assessment, as if it did not exist, but this rule can have no application to an assessment upon a franchise, where a reference to property is made only to ascertain the value of the thing assessed." And again: "It must be regarded as a sound doctrine to hold that the State, in granting a franchise to a corporation, may limit the powers to be exercised under it and annex conditions to its enjoyment, and make it contribute to the revenues of the State. If the grantee accepts the boon it must bear the burden."

This doctrine of the taxability of the franchises of a corporation without reference to the character of the property in which its capital stock or its deposits are invested is sustained by the judgments in *Society for Savings v. Coite*, 6 Wall. 594, and *Provident Institution v. Massachusetts*, 6 Wall. 611, which were before this court at December Term, 1867. In the first of these cases it appeared that a law of Connecticut of 1863 provided that savings banks in that State should make an annual return to the comptroller of public accounts "of the total amounts of all deposits in them, respectively, on the first day of July in each successive year," and should pay to the treasurer of the State a sum equal to three-fourths of one per cent on the total amount of deposits in such banks on those days, and that the tax should be in lieu of all other taxes upon the banks or their deposits. On the first day of July, 1863, the Society for Savings, one of the banks, had invested over \$500,000 of its deposits in securities of the United States, which were declared by Congress to be exempted from taxation by State authority, whether held by individuals, corporations, or associations. 12 Stat. 346, c. 33, § 2. Upon the amount of its deposits thus invested the society refused to pay the sum equal to the prescribed percentage. In a suit brought by the treasurer of the State to recover the tax, the payment of which was thus refused, the Supreme Court of Connecticut held that the tax was not on property but on the corporation as such. The case being brought here, the judgment was affirmed, this court holding that the tax was on the franchise of the corporation and not upon its property, and the fact that a part of the deposits was invested in securities of the United States did not exempt the society from the tax. Said the court: "Nothing can be more certain in legal decision than that the privileges and franchises of a private corporation, and all trades and avocations by which the citizens acquire a livelihood, may be taxed by a State for the support of the State government. Authority to that effect resides in the State independent of the Federal government, and is wholly unaffected by the

fact that the corporation or individual has or has not made investment in Federal securities." pp. 606-607.

It was contended in that case that the deposits in the bank were subjected to taxation from the fact that the extent of the tax was determined by their amount. But the court said: "... Different modes of taxation are adopted in different States, and even in the same State at different periods of their history. Fixed sums are in some instances required to be annually paid into the treasury of the State, and in others a prescribed percentage is levied on the stock, assets or property owned or held by the corporation, while in others the sum required to be paid is left indefinite, to be ascertained in some mode by the amount of business which the corporation shall transact within a defined period. Experience shows that the latter mode is better calculated to effect justice among the corporations required to contribute to the public burdens than any other which has been devised, as its tendency is to graduate the required contribution to the value of the privileges granted and to the extent of their exercise. Existence of the power is beyond doubt, and it rests in the discretion of the legislature whether they will levy a fixed sum, or if not, to determine in what manner the amount shall be ascertained." p. 608.

In the second case mentioned, *Provident Institution v. Massachusetts*, it appeared that the statute of Massachusetts, passed in 1862, levying taxes on certain insurance companies and depositors in savings banks, provided that every institution for savings incorporated under its laws should pay to the Commonwealth a tax of one-half of one per cent per annum on the amount of its deposits, to be assessed one-half of said annual tax on the average amount of its deposits for the six months preceding the 1st day of May, and the other half on the average amount of its deposits for the six months preceding the 1st day of November. The Provident Institution for savings in that State was authorized to invest its deposits in securities of the United States. Its average amount of deposits for the six months preceding the 1st day of May, 1865, was over eight millions, of which over one million was invested in such securities. It paid all the taxes demanded except on the portion which was thus invested. Upon that it declined to pay the tax. In a suit brought by the Commonwealth to recover the same, the Supreme Judicial Court of the State held that the tax was one on the franchise of the company and not on property, and therefore gave judgment for the Commonwealth. The case being brought here, the judgment was affirmed. In deciding the case, this court said, referring to a section of the statute under which the tax was levied: "Deposits, as the word is employed in that section, are the sums received by the institution from depositors, without regard to the nature of the funds. They are not capital stock in any sense, nor are they even investments, as the word is there used, which simply means the sums received wholly irrespective of the disposition made of the same, or their market value." And speaking of the difference existing between taxes upon franchises

and taxes upon property, it said: "Franchise taxes are levied directly by an Act of the Legislature, and the corporations are required to pay the amount into the State treasury. They differ from property taxes as levied for State and municipal purposes in the basis prescribed for computing the amount, in the manner of assessment, and in the mode of collection;" and again, "Comparative valuation in assessing property taxes is the basis of computation in ascertaining the amount to be contributed by an individual, but the amount of a franchise tax depends upon the business transacted by the corporation and the extent to which they have exercised the privileges granted in their charter." pp. 631, 632. The court also referred to a decision made by the Supreme Court of the State to the effect that the assessment imposed was to be regarded as an excise or duty on the privilege or franchise of the corporation, not as a tax on the moneys in its hands belonging to the depositors. It was the corporation, it said, that was to make the payment, and if it failed to do so it was liable not only to an action for the amount of the tax, but might also be enjoined from the future exercise of its franchise until all taxes should be fully paid. *Commonwealth v. People's Savings Bank*, 5 Allen, 428, 431.

And the court held that the valuation of the property had nothing to do with determining the amount of the tax, but that the amount depended on the average amount of deposits for the six months preceding the respective days named, and that there was no necessary relation between the average amount of the deposits and the amount of property owned by the institution; and, not being a property tax, it was to be considered as a franchise tax laid upon the corporation for the privileges conferred by its charter, which by all the authorities it was competent for the State to tax irrespective of what disposition the institution had made of its funds, or in what manner they had been invested. X

In *Hamilton Company v. Massachusetts*, 6 Wall. 632, a statute of Massachusetts which required corporations having a capital stock divided into shares, to pay a tax of a certain percentage upon the excess of the market value of such stock over the value of its real estate and machinery, was sustained as a statute imposing a franchise tax, notwithstanding a portion of the property which went to make the excess of the market value consisted of securities of the United States; this court, however, placing its decision upon the fact that under the provisions of the State Constitution and the practice under it the tax had been so considered by the highest tribunal of the State. This decision goes much farther than is necessary to sustain the judgment of the Court of Appeals of New York in the present case.

In this case we hold, as well upon general principles as upon the authority of the first two cases cited from 6th Wallace, that the tax for which the suit is brought is not a tax on the capital stock or property of the company, but upon its corporate franchise, and is not

therefore subject to the objection stated by counsel, because a portion of its capital stock is invested in securities of the United States.

Nor is the objection tenable that the statute, in imposing such tax, conflicts with the last clause of the first section of the Fourteenth Amendment of the Constitution of the United States, declaring that no State shall deprive any person within its jurisdiction of the equal protection of the laws. It is conceded that corporations are persons within the meaning of this amendment. It has been so decided by this court. *Pembina Cons. Silver Co. v. Pennsylvania*, 125 U. S. 181.¹ But the amendment does not prevent the classification of property for taxation — subjecting one kind of property to one rate of taxation, and another kind of property to a different rate — distinguishing between franchises, licenses and privileges, and visible and tangible property, and between real and personal property. Nor does the amendment prohibit special legislation. Indeed, the greater part of all legislation is special, either in the extent to which it operates, or the objects sought to be obtained by it. And when such legislation applies to artificial bodies, it is not open to objection if all such bodies are treated alike under similar circumstances and conditions, in respect to the privileges conferred upon them and the liabilities to which they are subjected. Under the statute of New York all corporations, joint stock companies and associations of the same kind are subjected to the same tax: There is the same rule applicable to all under the same conditions in determining the rate of taxation. There is no discrimination in favor of one against another of the same class. See *Barbier v. Connolly*, 113 U. S. 29, 32; *Soon Hing v. Crowley*, 113 U. S. 703, 709; *Missouri Pacific Railway v. Humes*, 115 U. S. 512, 523; *Missouri Pacific Railway v. Muckey*, 127 U. S. 205, 209; *Minneapolis Railway Co. v. Beckwith*, 129 U. S. 26, 32.

MR. JUSTICE MILLER (with whom concurred MR. JUSTICE HARLAN), dissenting: MR. JUSTICE HARLAN and myself dissent from the judgment in this case, because we think that, notwithstanding the peculiar language of the statute of New York, the tax in controversy is, in effect, a tax upon bonds of the United States held by the insurance company.

¹ The case here cited has *dicta* to the effect stated in the text, but the point was not involved in the decision. *Contra*, *State v. Brown, &c. Man. Co.*, 25 Atl. Rep. 246, 248 (Rhode Island, 1892), in which the court (ROGERS, J.) holds that "the plain and evident meaning of the section is that the persons to whom the equal protection of the law is secured are persons born or naturalized, or endowed with life and liberty, and consequently natural, and not artificial, persons." — ED.

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7 Sup. Ct. R. 255- reh. holds that R.R. Co. refusing to pay taxes within a certain period must pay taxes in addition. Held invalid law. Corp. is person within 14th amendment. Th. says perhaps this case does decide that a corp. is a person. The principal objection is very sloppy

BELL'S GAP RAILROAD COMPANY v. PENNSYLVANIA.

SUPREME COURT OF THE UNITED STATES. 1889.

[134 U. S. 232.]

MOTIONS: (1) To revoke the allocatur and quash the writ of error; (2) To dismiss for want of jurisdiction; (3) To affirm the judgment below. The case is stated in the opinion.

Mr. William S. Kirkpatrick, Attorney-General of the Commonwealth of Pennsylvania, and *Mr. John F. Sanderson*, Deputy Attorney-General for the motions. *Mr. James W. M. Newlin*, opposing.

MR. JUSTICE BRADLEY delivered the opinion of the court. . . .

By the law of Pennsylvania all moneyed securities are subject to an annual State tax of three mills on the dollar of their actual value, except bonds and other securities issued by corporations, which are taxed at three mills on the dollar of the nominal or par value. If the treasurer of a corporation fails to make return of its loans, as required by law, the auditor-general makes out and files an account against the company, charging it with the tax supposed to be due. This account, if approved by the State treasurer, is served upon the corporation, which must pay the tax within a specified time, or show good cause to the contrary. If it objects to the tax, it is authorized, in common with all others who are dissatisfied with the auditor's stated accounts, to appeal to the Court of Common Pleas of the county where the seat of government is (at present Dauphin County), which appeal is served on the auditor-general, and by him transmitted to the clerk of said court, to be entered of record, subject to like proceedings as in common suits. A declaration is then filed on the stated account in behalf of the State, and the cause is regularly tried.

In the present case, on failure of the company (The Bell's Gap Railroad Company) to make return except under protest, the auditor-general made out an account against it containing the following charge:—

“Nominal value of script, bonds, and certificates of indebtedness owned by residents of Pennsylvania \$530,000 — tax three mills \$1617.00”

The company thereupon tendered an appeal, which was filed in the Court of Common Pleas of Dauphin County, a declaration was filed on the part of the State, and the cause was tried by the court, a jury being waived.

The appeal filed by the corporation (which was the basis of the proceedings in the court) contained eight grounds of objection to the tax. Most of these objections were founded upon the Constitution, or laws of Pennsylvania, and need not be noticed here. The second objection, which refers to the Constitution of the United States, was as follows, to wit: “II. The report of the company's treasurer was made under

protest and does not constitute an assessment, and the tax sought to be imposed on so much of the company's loans as the Commonwealth claims to be held by residents of Pennsylvania for their nominal or face value, which varies from the market value on account of the differing rates of interest, etc., is illegal, and the said tax cannot be lawfully deducted by the company's treasurer from the interest payable to the holders of said loans, and the Commonwealth's demands contravene section one of the Fourteenth Amendment to the Constitution of the United States, for the following reasons:" Amongst the reasons then assigned are: 1. That the nominal value of the bonds is not their real value; 2. That the owners of the bonds have no notice, and no opportunity of being heard; 3. That the company is taxed for property it does not own; 4. That the deduction of the tax from the interest payable to the bondholders is taking their property without due process of law, and denies to them the equal protection of the laws, since all other personal property in the State is taxed at its actual value, and upon notice to the owners. The seventh objection is as follows: "VII. The tax is void as impairing the company's obligation to its creditors."

On the trial of the cause the State offered in evidence the stated account, and the plaintiff in error offered the appeal and specification of objections and an affidavit of its treasurer. The Court of Common Pleas decided in favor of the company, but its decision was reversed on writ of error by the Supreme Court of Pennsylvania, and judgment was rendered in favor of the Commonwealth for \$666, being the amount of tax on bonds shown to have been owned by residents of Pennsylvania. . . .

On the merits we have no serious doubt.

1. *As to the assessment of the tax of three mills upon the nominal or face value of the bonds, instead of assessing it upon the actual value.* This might have been subject to question under the State laws; but the State courts have upheld the assessment as valid. We are to accept it, therefore, as part of the State system of taxation, authorized by its Constitution and laws. Then, how does it violate any provision of the Constitution of the United States? It is contended that it violates the first section of the Fourteenth Amendment, which forbids a State to withhold from any person the equal protection of the laws. We do not perceive that the assessment in question transgresses this provision. There is no unjust discrimination against any persons or corporations. The presumption is that corporate securities are worth their face value. Besides, the person that holds them is not affected by the tax unless he receives his interest from which the tax is deducted. So long as the interest is paid the security has to him full productive value; when it is not paid he pays no tax.

But, be this as it may, the law does not make any discrimination in this regard which the State is not competent to make. All corporate securities are subject to the same regulation. The provision in the Fourteenth Amendment, that no State shall deny to any person within

its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries, and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the State Legislature, or the people of the State in framing their Constitution. But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition. It would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject, that would include all cases. They must be decided as they arise. We think that we are safe in saying, that the Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation. If that were its proper construction, it would not only supersede all those constitutional provisions and laws of some of the States, whose object is to secure equality of taxation, and which are usually accompanied with qualifications deemed material; but it would render nugatory those discriminations which the best interests of society require; which are necessary for the encouragement of needed and useful industries, and the discouragement of intemperance and vice; and which every State, in one form or another, deems it expedient to adopt. . . .

2. *As to want of notice to the owners of the bonds.* What notice could they have which the law does not give them? They know that their bonds are to be assessed at their face value, and that a tax of three mills on the dollar of that value will be imposed; and that they will only be required to pay this tax when, and as, they receive the interest. If the State may assess the tax upon the face value of the bonds, notice *in pais* is not necessary. We think that there is nothing in this objection which shows any infraction of the Federal Constitution. It is urged that it is a taking of the bondholder's property without due process of law. We must confess that we cannot see it in this light. The process of taxation does not require the same kind of notice as is required in a suit at law, or even in proceedings for taking private property under the power of eminent domain. It involves no violation of due process of law, when it is executed according to customary forms and established usages, or in subordination to the principles which underlie them. We see nothing in the process of taxation complained of, which is obnoxious to constitutional objection on this score. Stockholders in the national banks are taxed in this way, and the method

has been sustained by the express decision of this court. *National Bank v. Commonwealth*, 9 Wall. 353.

3. *That the corporation is taxed for property it does not own.* This objection is not true in point of fact. The corporation, as the debtor of its bondholders, holding money in its hands for their use, namely, the interest to be paid, is merely required to pay to the Commonwealth out of this fund the proper tax due on the security. The tax is on the bondholder, not on the corporation. This plan is adopted as a matter of convenience, and as a secure method of collecting the tax. That is all. It injures no party. It certainly does not infringe the Constitution of the United States by making one party pay the debts and support the just burdens of another party, as is implied in the objection.

The other objections are embraced in those which we have already considered, and need no further notice.

We would say, in conclusion, that there are several decisions of this court which virtually dispose of most of the questions involved in the present case. We refer particularly to *National Bank v. Commonwealth*, *supra*; *The Dollar Savings Bank v. United States*, 19 Wall. 227, 240; *King v. United States*, 99 U. S. 229; *Hagar v. Reclamation District No. 1*, 111 U. S. 701; *Davidson v. New Orleans*, 96 U. S. 97; *Walston v. Nevins*, 128 U. S. 578, 581.

*The motion to dismiss the writ of error is denied, and the judgment of the Supreme Court of Pennsylvania is affirmed.*¹

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In *Ward v. Maryland*, 12 Wall. 418, 428 (1870), on error to the Court of Appeals of Maryland, in holding a statute of that State unconstitutional, as imposing a discriminating tax upon non-residents trading there, the court (CLIFFORD, J.) said: "Outside of the prohibitions, express and implied, contained in the Federal Constitution, the power of the States to tax for the support of their own governments is coextensive with the subjects within their unrestricted sovereign power, which shows conclusively that the power to tax may be exercised at the same time and upon the same subjects of private property by the United States and by the States without inconsistency or repugnancy. Such a power exists in the United States by virtue of an express grant for the purpose, among other things, of paying the debts and providing for the common defence and general welfare; and it exists in the States for the support of their own governments, because they possessed the power without restriction before the Federal Constitution was adopted, and still retain it, except so far as the right is prohibited or restricted by that instrument. *Gibbons v. Ogden*, 9 Wheat. 199; *Nathan v. Louisiana*, 8 How. 82. . . . Reasonable regulations for the collection of such taxes may be passed by the States, whether the property taxed belongs to residents or non-residents; and, in the

¹ Affirmed in *Jennings v. Coal Ridge, etc. Co.*, 147 U. S. 147 (1893). Compare *Pac. Exp. Co. v. Seibert*, 142 U. S. 339; *Giozza v. Tiernan*, 148 U. S. 657. — ED.

residents who sold articles within the state had to pay
license twice as high as the greatest amount required
on residents. It said that the statute imposed a discrim-

absence of any Congressional legislation upon the same subject, no doubt is entertained that such regulations, if not in any way discriminating against the citizens of other States, may be upheld as valid; but very grave doubts are entertained whether the statute in question does not embrace elements of regulation not warranted by the Constitution, even if it be admitted that the subject is left wholly untouched by any Act of Congress.

"Excise taxes levied by a State upon commodities not produced to any considerable extent by the citizens of the State may, perhaps, be so excessive and unjust in respect to the citizens of the other States as to violate that provision of the Constitution, even though Congress has not legislated upon that precise subject; but it is not necessary to decide any of those questions in the case before the court, as the court is unhesitatingly of the opinion that the statute in question is repugnant to the second section of the fourth article of the Constitution, which provides that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States. *Woodruff v. Parham*, 8 Wall. 139; *Hinson v. Lott*, 8 Id. 151.

"Taxes, it is conceded in those cases, may be imposed by a State on all sales made within the State, whether the goods sold were the produce of the State imposing the tax, or of some other State, provided the tax imposed is uniform; but the court at the same time decides in both cases that a tax discriminating against the commodities of the citizens of the other States of the Union would be inconsistent with the provisions of the Federal Constitution, and that the law imposing such a tax would be unconstitutional and invalid. Such an exaction, called by what name it may be, is a tax upon the goods or commodities sold, as the seller must add to the price to compensate for the sum charged for the license, which must be paid by the consumer or by the seller himself; and in either event the amount charged is equivalent to a direct tax upon the goods or commodities. *Brown v. Maryland*, 12 Wheat. 444; *People v. Moring*, 3 Keyes, 374.

"Imposed as the exaction is upon persons not permanent residents in the State, it is not possible to deny that the tax is discriminating with any hope that the proposition could be sustained by the court. Few cases have arisen in which this court has found it necessary to apply the guaranty ordained in the clause of the Constitution under consideration. *Conner v. Elliott*, 18 How. 593.

"Attempt will not be made to define the words 'privileges and immunities,' or to specify the rights which they are intended to secure and protect, beyond what may be necessary to the decision of the case before the court. Beyond doubt those words are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation; to acquire personal property; to take and hold real estate; to maintain

actions in the courts of the State; and to be exempt from any higher taxes or excises than are imposed by the State upon its own citizens. Cooley on Constitutional Limits, 16; *Brown v. Maryland*, 12 Wheat. 449. Comprehensive as the power of the States is to lay and collect taxes and excises, it is nevertheless clear, in the judgment of the court, that the power cannot be exercised to any extent in a manner forbidden by the Constitution; and inasmuch as the Constitution provides that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States, it follows that the defendant might lawfully sell, or offer or expose for sale, within the district described in the indictment, any goods which the permanent residents of the State might sell, or offer or expose for sale in that district, without being subjected to any higher tax or excise than that exacted by law of such permanent residents. *State v. North et al.*, 27 Mo. 467; *Fire Department v. Wright*, 3 E. D. Smith, 478; *Paul v. Virginia*, 8 Wall. 177.

Grant that the States may impose discriminating taxes against the citizens of other States, and it will soon be found that the power conferred upon Congress to regulate interstate commerce is of no value, as the unrestricted power of the States to tax will prove to be more efficacious to promote inequality than any regulations which Congress can pass to preserve the equality of right contemplated by the Constitution among the citizens of the several States. Excise taxes, it is everywhere conceded, may be imposed by the States, if not in any sense discriminating; but it should not be forgotten that the people of the several States live under one common Constitution, which was ordained to establish justice, and which, with the laws of Congress, and the treaties made by the proper authority, is the supreme law of the land; and that that supreme law requires equality of burden, and forbids discrimination in State taxation when the power is applied to the citizens of the other States. Inequality of burden, as well as the want of uniformity in commercial regulations, was one of the grievances of the citizens under the Confederation; and the new Constitution was adopted, among other things, to remedy those defects in the prior system."¹

Statute of N.Y.

imposed a tax upon

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created

under any law

of any other state or country, and doing

business in the state. In an action by the state

N.Y. to recover taxes from a corp. created under

HORN SILVER MINING COMPANY v. NEW YORK STATE.

SUPREME COURT OF THE UNITED STATES. 1892.

[143 U. S. 305.]

[ERROR to the Supreme Court of the State of New York. The State brought the action to recover taxes from the plaintiff in error, a corporation created under the laws of the Territory of Utah. The

¹ See also *Oliver v. Washington Mills*, 11 Allen, 268, 280. — Ed.

² The statement of facts is omitted. — Ed.

corp. can claim a right to do business in the
state only subject to the conditions imposed by

taxes were assessed under a statute subjecting thereto corporations
"organized under any law of the State or of any other State or country,
and doing business in the State."

Mr. Julien T. Davies (with whom was Mr. Edward Lyman Short
on the brief) for plaintiff in error. Mr. Charles F. Tabor, Attorney-
General of the State of New York, submitted on his brief.

MR. JUSTICE FIELD delivered the opinion of the court.

A corporation being the mere creature of the legislature, its rights,
privileges, and powers are dependent solely upon the terms of its char-
ter. Its creation (except where the corporation is sole) is the investing
of two or more persons with the capacity to act as a single individual,
with a common name, and the privilege of succession in its members
without dissolution, and with a limited individual liability. The right
and privilege, or the franchise, as it may be termed, of being a corpora-
tion, is of great value to its members, and is considered as property
separate and distinct from the property which the corporation itself may
acquire. According to the law of most States this franchise or privi-
lege of being a corporation is deemed personal property, and is subject
to separate taxation. The right of the States to thus tax it has been
recognized by this court and the State courts in instances without
number. . . . [Here follows a quotation from the opinion in *Delaware
Railroad Tax*, 18 Wall. 206, 231.]

The granting of the rights and privileges which constitute the fran-
chises of a corporation being a matter resting entirely within the con-
trol of the legislature, to be exercised in its good pleasure, it may be
accompanied with any such conditions as the legislature may deem most
suitable to the public interests and policy. It may impose as a condition
of the grant, as well as, also, of its continued exercise, the payment of
a specific sum to the State each year, or a portion of the profits or gross
receipts of the corporation, and may prescribe such mode in which the
sum shall be ascertained as may be deemed convenient and just. There
is no constitutional inhibition against the legislature adopting any mode
to arrive at the sum which it will exact as a condition of the creation
of the corporation or of its continued existence. There can be, there-
fore, no possible objection to the validity of the tax prescribed by the
statute of New York, so far as it relates to its own corporations. Nor
can there be any greater objection to a similar tax upon a foreign cor-
poration doing business by its permission within the State. As to a
foreign corporation — and all corporations in States other than the
State of its creation are deemed to be foreign corporations — it can
claim a right to do business in another State, to any extent, only sub-
ject to the conditions imposed by its laws.

As said in *Paul v. Virginia*, 8 Wall. 168, 181, "the recognition of
its existence, even, by other States, and the enforcement of its con-
tracts made therein, depend purely upon the comity of those States, — a
comity which is never extended where the existence of the corporation
or the exercise of its powers is prejudicial to their interests or repug-

the employ of the gen. govt. Though it may be a hard
in being compelled to pay a tax estimated accord-
ing to the amount of business or capital within

nant to their policy. Having no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion." This doctrine has been so frequently declared by this court that it must be deemed no longer a matter of discussion, if any question can ever be considered at rest.

Only two exceptions or qualifications have been attached to it in all the numerous adjudications in which the subject has been considered, since the judgment of this court was announced more than half a century ago in *Bank of Augusta v. Earle*, 13 Pet. 519. One of these qualifications is that the State cannot exclude from its limits a corporation engaged in interstate or foreign commerce, established by the decision in *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U. S. 1, 12. The other limitation on the power of the State is, where the corporation is in the employ of the general government, an obvious exception, first stated, we think, by the late Mr. Justice Bradley in *Stockton v. Baltimore & New York Railroad*, 32 Fed. Rep. 9, 14. As that learned justice said: "If Congress should employ a corporation of ship-builders to construct a man-of-war, they would have the right to purchase the necessary timber and iron in any State of the Union." And this court, in citing this passage, added, "without the permission and against the prohibition of the State." *Pembina Mining Co. v. Pennsylvania*, 125 U. S. 181, 186.

Having the absolute power of excluding the foreign corporation the State may, of course, impose such conditions upon permitting the corporation to do business within its limits as it may judge expedient; and it may make the grant or privilege dependent upon the payment of a specific license tax, or a sum proportioned to the amount of its capital. No individual member of the corporation, or the corporation itself, can call in question the validity of any exaction which the State may require for the grant of its privileges. It does not lie in any foreign corporation to complain that it is subjected to the same law with the domestic corporation. The counsel for the appellant objects that the statute of New York is to be treated as a tax law, and not as a license to the corporation for permission to do business in the State. Conceding such to be the case, we do not perceive how it in any respect affects the validity of the tax. However it may be regarded, it is the condition upon which a foreign corporation can do business in the State, and in doing such business it puts itself under the law of the State, however that may be characterized.

The only question therefore open to serious consideration in this case is one of fact: Did the Horn Silver Mining Company do business as

an corp. individually.

a corporation within the State? The referee found such to be the fact, as a conclusion from many probative circumstances in the case. That finding was never set aside, but stands approved by the courts of New York. . . .

It is true, the greater part of the business of the company was done out of the State, and the greater part of its capital was also without it, but the statute of New York does not require that the whole business of a foreign corporation shall be done within the State in order to subject it to the taxing power of the State. It makes, in that respect, no difference between home corporations and foreign corporations, as to the franchise or business of the corporation upon which the tax is levied, provided it does business within the State, as such corporation.

There seems to be a hardship in estimating the amount of the tax upon the corporation, for doing business within the State, according to the amount of its business or capital without the State. That is a matter, however, resting entirely in the control of the State, and not a matter of Federal law, and with which, of course, this court can in no way interfere.

Since this tax was levied the law of the State has been altered, and now the tax upon foreign corporations doing business in the State is estimated by the consideration only of the capital employed within the State. It is said that against nearly all other foreign corporations, except this one, the taxes upon their franchises have been computed upon the basis of the capital employed within the State; but as to that we can only repeat what was said in the Court of Appeals of the State, that, if this be true, the defendant may have reason to complain of unjust discrimination and may properly appeal for relief to the legislature of the State, but that it is not within the power of the court to grant any relief, however great the hardship upon it.

The extent of the tax is a matter purely of State regulation, and any interference with it is beyond the jurisdiction of this court. The objection that it operates as a direct interference with interstate commerce, we do not think tenable. The tax is not levied upon articles imported, nor is there any impediment to their importation. The products of the mine can be brought into the State and sold there without taxation, and they can be exhibited there for sale in any office or building obtained for that purpose; the tax is levied only upon the franchise or business of the company.

Judgment affirmed.

MR. JUSTICE HARLAN dissented.¹

¹ In *The Lumberville, &c. Co. v. State B'd Assessors*, 55 N. J. Law, 529, 537 (1893), the court (GARRISON, J.) said: "The franchise that is taxed as property is the privilege enjoyed by a corporation of exercising certain powers derived from the State, whereas the franchise with which we have to do is the right to exist in corporate form without reference to the powers that under such form the company may exercise. This distinction, although formulated by Mr. Justice Field in *Home Insurance Company v. New York*, 134 U. S. 594, was not strictly adhered to in his subsequent expressions, probably because there was nothing in that case to call for a nice use of terms. In this State we tax each of these so-called franchises. The former, as in the case of

case to put construction on const - which has
 been followed since - as to taxation.

PORTLAND BANK v. APTHORP.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1815.

[12 Mass. 252.1]

AN argument was had, at the last March term in Suffolk, by *Prescott* and *E. Whitman*, for the plaintiffs, and by *Morton*, Attorney-General, and *Davis*, Solicitor-General, for the defendant.

The opinion of the court was delivered, at this term, by

PARKER, C. J. . . . The charter, by which the plaintiffs were incorporated, was granted in 1799; and powers were given by it to carry on the business of loaning money for the period of twenty years. No bonus was required by the legislature, nor was there any reservation of a right to levy a tax or an excise upon the company. The effect of this charter was, to give to the individuals who applied for it, and their successors, a right to act as a body corporate and politic in the management of their common funds, under the restrictions and regulations provided in the charter.

They now contend, that, as the privilege was freely given to them by the government for a limited period, they cannot be subject to any tax or tribute to the government during the existence of the charter, because the legislature is, by the Constitution, limited in its powers of taxation to an equal and proportionate assessment upon all the property in the Commonwealth, and that it has not the power to select any individuals or company, or any specific object of property, and demand a tax of them, separate and distinct from such tax as might result from its equal and proportionate share of such taxes as should be required of all other individuals, companies, or property, within the Commonwealth.

The words of the Constitution, from which the authority of the legislature to impose taxes and to obtain a revenue is derived, are, "to impose and levy proportionate and reasonable assessments, rates, and taxes upon all the inhabitants of, and persons resident and estates lying within, the Commonwealth; and also to impose and levy rea-

the right to own and operate a railroad, is taxed as property having a true value, which it is the duty of the State board to ascertain for the purposes of constitutional assessment. On the other hand, the naked right of existing in corporate form is taxed as in the case before us, not at its true value, as it would have to be if it were property, but at a sum arbitrarily imposed by the legislature as an annual fee, the amount of which is to be computed by reference to the capital of the company as a criterion. It is, in short, a poll tax levied upon domestic corporations for the right to be. Such a tax is not upon property or assets, and does not in any way concern the nature of the business the company may be authorized to carry on. If the business chance to be one of commercial intercourse with other States, the burden incidental to corporate existence does not, under the Federal decisions just cited [*Horne Ins. Co. v. N. Y.*, and *Horn Silc. Min. Co. v. N. Y.*], constitute a regulation of that commerce." — ED.

¹ The statement of facts is omitted. — ED.

or excise upon branches of business wh. exist
 license is no infringement of any privilege
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on property? To tax prop. it must be p
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sonable duties and excises upon any produce, goods, wares, and merchandise, and commodities whatsoever, brought into, produced, manufactured, or being within the same."

Under the first branch of this power, namely, that of imposing and levying rates and taxes, the requisition upon the banks cannot be justified; for those taxes must be proportional upon all the inhabitants of, and persons resident and estates lying within, the Commonwealth. The exercise of this power requires an estimate or valuation of all the property in the Commonwealth; and then an assessment upon each individual, according to his proportion of that property. To select any individual or company, or any specific article of property, and assess them by themselves, would be a violation of this provision of the Constitution.

But there are other sources of emolument and profit, not strictly called property, but which are rather to be considered as the means of acquiring property, from which a reasonable revenue may be exacted by the legislature, within the fair meaning of the other branches of the power above recited. The exercise of this power is called the imposing or levying of duties and excises; and the subjects upon which they are to be levied are produce, goods, wares, merchandise, and commodities, brought into, produced, manufactured, or being within the State. The former provision seems to be intended as a contribution of the individual citizens, in proportion to the property, whether real or personal, which they are respectively worth. The latter is a tax upon the articles, whoever may be the owner, or into whose hands soever they may go; operating as compensation for the privilege of producing, manufacturing, or bringing them within the State; and the sum which each individual may pay of this latter species of tax, may not be in proportion to his property; but will be only in proportion to the quantity of such particular article so taxed, as may be consumed by him, or used by him, in the way of his business and employment.

The term excise is of very general signification, meaning tribute, custom, tax, tollage, or assessment. It is limited, in our Constitution, as to its operation, to produce, goods, wares, merchandise, and commodities. This last word will perhaps embrace everything, which may be a subject of taxation, and has been applied by our legislature, from the earliest practice under the Constitution, to the privilege of using particular branches of business or employment, as, the business of an auctioneer, of an attorney, of a tavern-keeper, of a retailer of spirituous liquors, &c.

It must have been under this general term, commodity, which signifies convenience, privilege, profit, and gains, as well as goods and wares, which are only its vulgar signification, that the legislature assumed the right, which has been uniformly, and without complaint, exercised for thirty years, of exacting a sum of money from attorneys, and barristers at law, vendue masters, tavern-keepers, and retailers.

For every man has a natural right to exercise either of these employ-

business. This tax was here imposed on the privilege of doing business - on the franchise of the cook. So all prop. in state has to

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and a tax or license imposed on it.

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ments free of tribute, as much as a husbandman or mechanic has to use his particular calling. The money required of them is not a proportional tax; nor is it an excise or duty upon produce, goods, wares, or merchandise. It is a commodity, convenience, or privilege, which the legislature has, by contemporaneous construction of the Constitution, assumed a right to sell at a reasonable price; and, by parity of reason, it may impose the same conditions upon every other employment or handicraft.

It is true, that it may be unsafe, generally, to infer from the actual use of power by a government its original right to exercise that power; and, certainly, no continuance of usurpation upon the rights of a citizen, however long, can deprive him of those rights. But in questions touching the powers of government under a written constitution, not affecting the essential rights of the citizen, the practice and usage of successive legislatures, from the time the government began, when its powers, as well as the rights of the subject, were well understood, and when there was a general disposition to keep all the departments within their prescribed sphere, down to the present time, may furnish strong grounds for explanation of parts which are obscure, or not perfectly explicit.

According to the construction of the Constitution, there can be no doubt that the legislature might as well exact a fee or tribute from brokers, factors, or commission merchants, for the privilege of transacting their business, as from auctioneers, or inholders, or retailers, or attorneys. It will, undoubtedly, be the policy of a wise legislature, not to multiply burdens of this sort; but we speak only of their power, presuming that it will never be exercised but for wise or necessary purposes.

If it should be true that this right exists with respect to individuals, then the only remaining question is, whether, when a number of individuals have associated for the purpose of carrying on the business of brokerage, money-lending, or factorage, more conveniently, extensively, and securely, and for that purpose have obtained a license or charter from the government, they are exempt from a liability which would attach to them severally as individuals. Did the legislature, when it incorporated the plaintiffs, relinquish the right of laying an excise or duty upon the business which they should transact during the continuance of the charter of incorporation? There is no express waiver or relinquishment, nor is there any strong implication of one. The object of their charter is to enable them, in a body, to conduct their business as an individual, to make contracts, and to enforce them as such, avoiding the inconveniences of a copartnership. This is all that is asked for by the company, and all that is given by the charter. It is a privilege to manage their business, and not an exemption from duty. Suppose that heretofore the legislature should have enacted that no person should keep a public house, or retail spirituous liquors, without a license from some authority by them designated, but without exact-

ing any tax or duty therefor; could it be contended that afterwards they were precluded from establishing a tax or excise upon the business thus permitted to be exercised?

Every man has the implied permission of the government to carry on any lawful business; and there is no difference in the right, between those which require a license and those which do not, except in the prohibition, either express or implied, where a license is required. So that to lay a duty or excise upon branches of business which exist by license is no infringement of any privilege conveyed by such license.

The late law of the United States, requiring the use of a license, and establishing a tax to the government, seems to be predicated upon the same principles. For Congress has seen fit to require fifty per cent from tavern-keepers and retailers, in addition to the sum originally paid for the license, within the term for which it was granted.

Taxes of this sort must undoubtedly be equal; that is, they must operate upon all persons who exercise the employment which is so taxed. A tax upon one particular moneyed capital would unquestionably be contrary to the principles of justice, and could not be supported; but a tax upon all banks we think justifiable upon the grounds we have stated.

*Plaintiff's nonsuit.*¹

GLEASON v. MCKAY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1883.

[134 Mass 419.]

CONTRACT by the treasurer of the Commonwealth against the trustee of the McKay Sewing Machine Association, to recover a tax assessed upon said association for the year 1879, in pursuance of the St. of 1878, c. 275. The case was submitted to the Superior Court, and, after judgment for the defendant, to this court, on appeal, on agreed facts. . . .

C. H. Barrows, Assistant Attorney-General, for the plaintiff. *E. Merwin*, for the defendant.

MORTON, C. J. The principal question in this case is whether the St. of 1878, c. 275, as applied to the defendant, is constitutional. The first section of the statute provides that "Chapter two hundred and eighty-three of the Acts of the year one thousand eight hundred and sixty-five, and the Acts in amendment thereof, are hereby extended to apply, so far as applicable, to companies, copartnerships, and other associations having a location or place of business within this Commonwealth, in which the beneficial interest is held in shares which are assignable without consent of the other associates specifically authorizing such transfer. And the tax provided for in said chapter two hundred and eighty-three

¹ Compare *Conn. Mut. Life Ins. Co. v. Com'th*, 133 Mass. 161; *Mayor of Savannah v. Weed*, 84 Ga. 683 (1890). — Ed.

Suit to recover a tax assessed upon the McKay Sewing Machine Association, to recover a tax assessed upon said association for the year 1879, in pursuance of the St. of 1878, c. 275. The case was submitted to the Superior Court, and, after judgment for the defendant, to this court, on appeal, on agreed facts. . . .

Signale wo. the consent of the other associates the provisions of an act 13 years earlier w taxed corporations. The tax was based on t

Const. of Mass. required that excise
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GLEASON v. McKAY.

[CHAP. VII.]

shall be paid by such company, copartnership, or association upon the aggregate value of the shares of said capital stock, in the manner provided in said chapter for taxes upon corporations."

The power of taxation, using the word in its generic sense as including all rates and impositions laid or levied upon the people, is conferred upon the legislature by the Constitution, and is to be held and exercised subject to the limitations imposed by the Constitution. *Oliver v. Washington Mills*, 11 Allen, 268. The legislature is given the power "to impose and levy proportional and reasonable assessments, rates and taxes, upon all the inhabitants of, and persons resident, and estates lying, within the said Commonwealth," and also power "to impose, and levy, reasonable duties and excises, upon any produce, goods, wares, merchandise, and commodities, whatsoever, brought into, produced, manufactured, or being within the same." Const. Mass. c. 1, art. 4.

It is clear that the statute in question was not intended to lay a tax upon property within the first of these clauses. It does not purport to do this. It merely extends to certain copartnerships and associations the provisions of the St. of 1865, c. 283, which chapter has been held to levy an excise upon corporate franchises, and not to lay a tax on property, and which chapter can be sustained as constitutional only upon the ground that it levies an excise. *Murray v. Berkshire Ins. Co.*, 104 Mass. 586; *Commonwealth v. Hamilton Manuf. Co.*, 12 Allen, 298. Regarded as a tax on property, the tax we are considering would be invalid because not proportional; it would be an imposition upon certain property at a rate different from that to which other property in the Commonwealth is subject. But, as we have said, it does not purport to be a tax on property. In levying an imposition under this statute, no inquiry is made as to what property liable to taxation any copartnership, or other association which comes within its terms, has. Such property remains liable to taxation under the general laws. This imposition is based "upon the aggregate value of the shares of said capital stock." Such shares, if they can be said to be property, are not the property of the copartnership or association which is taxed, but of the individual partners or shareholders. It is very clear that this was intended as an excise upon some franchises or privileges sought to be held by the copartnerships or associations in supposed analogy to the franchises of corporations. And the question is whether this imposition can be upheld as such excise within the second clause of the Constitution, cited above. In this clause, there are two limitations upon the power of the legislature in imposing excises. They must be reasonable, and they must be excises upon some produce, goods, wares, merchandise or commodities, brought into, produced, manufactured, or being within the Commonwealth.

It will not be seriously contended that the privileges or rights which are taxed by this statute can be properly described as either produce, goods, wares, or merchandise. Do they fairly come within the term

by the govt & exercised by its permission. A joint
Co. was not such. The peculiar feature
a joint stock Co. is not a commodity and

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does not mean the privilege of doing business

"commodities," in the sense in which it is used in the Constitution? Ever since the adoption of the Constitution, the legislature in its practice, and this court in its adjudications, have given a very broad and extensive meaning to this term. { It has been repeatedly held that corporate franchises enjoyed by grant from the government are commodities, and subject to an excise. } So with corporate franchises granted by a foreign government, which by comity are permitted to be exercised within this Commonwealth. So where the legislature has thought, upon considerations of public policy, that certain occupations or callings, of a public or quasi public character, should be carried on under governmental regulation, it has been usual to impose a reasonable fee for a license. *Portland Bank v. Apthorp*, 12 Mass. 252; *Commonwealth v. People's Five Cents Savings Bank*, 5 Allen, 428; *Commonwealth v. Hamilton Manuf. Co.*, *ubi supra*; *Commonwealth v. Cary Improvement Co.*, 98 Mass. 19; *Connecticut Ins. Co. v. Commonwealth*, 133 Mass. 161. This imposition is clearly not in the nature of a license fee, but is an excise upon a franchise or privilege. The right to levy excises upon franchises has never been extended further than to corporate franchises specially granted by the government, or enjoyed and exercised by its permission.

The defendant in this case is not a corporation. It is merely a partnership, with all the incidents and responsibilities of a partnership. The firm property is taxable at its business domicile. *Hoadley v. County Commissioners*, 105 Mass. 519. It enjoys no franchises conferred upon it by the legislature. It does not ask for or enjoy any corporate or special privileges. It has constituted its partnership under its common-law rights and such legal agreements as it chooses to make. The peculiar feature that the interest of each member may be transferred without the special assent of the other members, is created by agreement of the partners under their natural rights at common law. We do not see how this peculiar feature can be called a commodity, subject to a special excise, any more than the agreement of copartnership itself, or any clause or part of it, or any other agreement, right or mode of transacting any business, can be called a commodity, and so liable to taxation at the will of the legislature.

If this tax can be upheld, it seems to us that the necessary result will be that the legislature has the power to select any business, occupation, or calling carried on, or any natural right enjoyed, under the protection of our laws, and impose upon it at its will a special tax or excise. This would be extending the meaning of the word "commodities" beyond any reasonable limits. Its effect would be to break down the limitations which the Constitution intended to impose upon the power of the legislature, for the purpose of securing the end that all sums necessary for the defence and support of the government should as far as practicable be raised by the equal taxation of the people.

We are therefore of opinion that the St. of 1878, c. 275, so far as it applies to the defendant, is unconstitutional.

Judgment for the defendant.

MINOT v. WINTHROP. WILLIAMS v. BOWDITCH.
WEST v. PHILLIPS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1894.

[162 Mass. 000.]

[THE opinion in these cases, decided Oct. 17, 1894 and not yet reported, is printed from a certified copy furnished by the Reporter of Decisions. The important section of the statute under discussion is printed in a note.]

FIELD, C. J. All these cases involve the constitutionality of St. 1891, c. 425.¹ The objections urged against this statute are that the right of succession to property on the death of the owner is a necessary incident of property which is protected by the Constitution of Massachusetts; that a tax upon such succession is in effect a tax upon the property and is subject to the limitations put upon a tax upon estates by the Constitution; that if such a tax is not a tax upon property but an excise upon the right of succession this right cannot be considered as "goods, wares, merchandise, and commodities" within the meaning of these words in the Constitution; and that even if the right can be considered as a commodity the tax imposed by the statute is unreasonable, because the statute is unequal in its operation, and makes arbitrary distinctions between those persons and estates that are and those that are not subject to its provisions. The Attorney-General concedes that the tax imposed by the statute is invalid if it is a tax on property or estates. He contends that the tax is an excise; that the succession to property on the death of the owner is a privilege created by law and a commodity within the meaning of the Constitution, and that as an excise the tax is reasonable.

St. 1891, c. 425, purports to be a statute imposing a tax, and we think it apparent that the legislature in passing it intended to act under the authority granted to the General Court by the Constitution to impose and levy taxes. This authority is found in the Constitution,

¹ Section 1 is as follows: "All property within the jurisdiction of the Commonwealth, and any interest therein, whether belonging to inhabitants of the Commonwealth or not, and whether tangible or intangible, which shall pass by will or by the laws of the Commonwealth regulating intestate succession, or by deed, grant, sale, or gift, made or intended to take effect in possession or enjoyment after the death of the grantor, to any person in trust or otherwise, other than to or for the use of the father, mother, husband, wife, lineal descendant, brother, sister, adopted child, the lineal descendant of any adopted child, the wife or widow of a son, or the husband of a daughter of a decedent, or to or for charitable, educational, or religious societies or institutions, the property of which is exempt by law from taxation, shall be subject to a tax of five per centum of its value, for the use of the Commonwealth; . . . *provided, however*, that no estate shall be subject to the provisions of this Act unless the value of the same, after the payment of all debts, shall exceed the sum of ten thousand dollars." — ED.

Part II., c. 1, § 1, art. 4, and is full power and authority "to impose and levy proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and persons resident, and estates lying, within the said Commonwealth; and also to impose and levy reasonable duties and excises upon any produce, goods, wares, merchandise, and commodities, whatsoever, brought into, produced, manufactured, or being within the same; to be issued and disposed of by warrant, under the hand of the Governor of this Commonwealth for the time being, with the advice and consent of the council, for the public service, in the necessary defence and support of the government of the said Commonwealth, and the protection and preservation of the subjects thereof, according to such Acts as are or shall be in force within the same." The Constitution also provides as follows: "And while the public charges of government, or any part thereof, shall be assessed on polls and estates, in the manner that has hitherto been practised, in order that such assessments may be made with equality, there shall be a valuation of estates within the Commonwealth, taken anew once in every ten years at least, and as much oftener as the General Court shall order."

In the constitutional convention the committee appointed to prepare a Declaration of Rights and a Frame of a Constitution reported a draft of a constitution which gave to the General Court in the matter of taxation only the authority "to impose and levy proportional and reasonable assessments, rates, and taxes upon the persons of all the inhabitants of and residents within the said Commonwealth, and upon all estates within the same, to be issued and disposed of by warrant," etc. This was in effect the same as in the Province Charter. This draft also contained the following provision: "And that public assessments may be made with equality there shall be a valuation of estates within the Commonwealth taken once in every ten years at least." *Journal of Convention, 1779-80, p. 198, c. 2, § 3, of the draft.* In the convention the paragraphs above quoted were referred to committees who reported them in the form in which they stand in the Constitution. *Ibid.*, pp. 61-63. Under the Province Charter the General Court had laid imposts and excises in addition to taxes and assessments upon the persons and estates of the inhabitants, but it is evident that the framers of the Constitution intended that the authority to do this should be express. But neither in the Province nor in England had there been a tax on legacies and inheritances at the time when the Constitution was adopted, although it was a form of taxation which had been used on the Continent of Europe. See *The Inheritance Tax*, by Max West, vol. 4, No. 2, of the *Studies in History, Economics, and Public Law of Columbia College*; *Smith's Wealth of Nations*, Book V., c. 2; *Dos Passos on Law of Collateral Inheritance Taxes*; *Hanson's Probate Legacy and Succession Duties*.

The descent or devolution of property on the death of the owner in England and in this country has always been regulated by law. We

have no occasion in these cases to consider whether the legislature has the power to make the Commonwealth the universal legatee or successor of all the property of all its inhabitants when they die, for the purposes not only of paying the public charges, but also of distributing the property according to its will among the living inhabitants or for the purpose of abolishing private property altogether. We assume that under the Constitution this cannot be done either directly or indirectly; that the legislature cannot so far restrict the right to transmit property by will or by descent as to amount to an appropriation of property generally; that it cannot impose a tax which shall be equivalent or almost equivalent to the value of the property, and cannot so limit the persons who can take as heirs, devisees, distributees, or legatees that the great mass of all the property of the inhabitants must become vested in the Commonwealth by escheat. The State can take property by taxation only for the public service, and we assume that its right to take property, if any exists, by regulating the distribution of it on the death of the owner is limited in the same manner, and that this right must be exercised in a reasonable way.

Under our system of law the right to make a will or testament and the right to transmit or take property by descent are now mainly if not wholly regulated by statute. In *Muger v. Grima*, 8 How. 490-493, the Supreme Court of the United States say of a statute of Louisiana: "Now the law in question is nothing more than an exercise of the power which every State and sovereignty possesses of regulating the manner and terms upon which property real or personal, within its dominion, may be transmitted by last will and testament or by inheritance, and of prescribing who shall and who shall not be capable of taking it." In *Brettun v. Fox*, 100 Mass. 234, this court say: "The objection of the respondent that the statute could not constitutionally limit the owner's power of testamentary disposition is equally novel and unfounded. The power to dispose of property by will is neither a natural nor a constitutional right, but depends wholly upon statute, and may be conferred, taken away, or limited and regulated, in whole or in part, by the legislature; and no exercise of legislative authority in this respect is more usual than that which secures to a widow a certain share in the estate of her husband." See *Lavery v. Egan*, 143 Mass. 389.

If under the power to regulate the devolution of property on the death of the owner, the legislature cannot take away altogether the inheritable quality of property, yet such regulations as are thought reasonable concerning the persons who can take or transmit real or personal property by will or inheritance have been made in every civilized State. Taxes on legacies and inheritances or on succession in any form to property on the death of the owner have generally been considered not as taxes upon property but as excises upon the privilege of taking or transmitting property in this way. The decision in *Curry v. Spencer*, 61 N. H. 624, that a statute imposing such a tax is in violation of

a different doctrine and said the tax there
 as a discriminating one. This Court should
 have overruled the previous case.

the Constitution of New Hampshire, goes on the ground that the tax is not proportional, and so cannot be supported as a tax upon property under the Constitution of that State, which it seems authorizes only taxes and assessment upon polls and property. See *State v. Express Co.*, 60 N. H. 219.

The Constitution of the United States, by art. 1, § 8, provides as follows: "The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States." Direct taxes must be apportioned among the several States according to the respective numbers of their inhabitants, to be determined as provided by the second section of the same article. In *Scholey v. Rew*, 23 Wall. 331, the validity of the succession taxes imposed by the U. S. St. of June 30, 1864, as amended by the St. of July 13, 1866, was considered. 13 St. at Large, 287, *et seq.*, 14 St. at Large, 140, *et seq.* There was no room for any contention that the Congress of the United States could regulate in the States the transmission of property by will or inheritance, and the question was whether it had authority under the taxing power to impose such taxes. The decision was that such taxes were not direct taxes, but excises or duties, and as such within the authority of Congress to lay and collect without apportionment among the States. The decisions generally are that such taxes are excises. See *Mayer v. Grima*, 8 How. 490; *In re McPherson*, 104 N. Y. 306; *In re Estate of Swift*, 137 N. Y. 77; *In re Knoedler*, 140 N. Y. 377; *Wallace v. Myers*, 38 Fed. Rep. 184; *State v. Dalrymple*, 70 Md. 294; *Tyson v. State*, 28 Md. 577; *Eyre v. Jacob*, 14 Gratt. 422; *Pullen v. Commissioners*, 66 N. C. 361; Dos Passos on Law of Collateral Inheritance and Taxes; Hanson's Probate Legacy and Succession Duties.

It is contended that the authority given in our Constitution to the General Court is not to levy duties and excises generally, but only to levy duties and excises "upon any produce, goods, wares, merchandise, and commodities whatsoever brought into, produced, manufactured, or being within the" Commonwealth. The excises to which the inhabitants of the Province of the Massachusetts Bay were accustomed were taxes in the nature of license fees for carrying on certain kinds of business, taxes on the sale of goods, wares, and merchandise, such as intoxicating liquors, tea, coffee and chocolate, china ware, etc., and stamp taxes on legal papers. The words "produce, goods, wares, and merchandise" "brought into, produced, manufactured, or being" within the Commonwealth, are words of definite meaning, but the words "any commodities whatsoever" are of less certain signification. In a general sense, a commodity is something of convenience, advantage, benefit, or profit; and in a special sense, a commodity is something produced for use and an article of trade or commerce. It has been decided that the word "commodities" in our Constitution is not used in

this special sense, and that it means more than "produce, goods, wares, and merchandise." In *Portland Bank v. Apthorp*, 12 Mass. 252, 256, the court say: "The term 'excise' is of very general signification, meaning tribute, custom, tax, tollage, or assessment. It is limited in our Constitution as to its operation, to produce, goods, wares, merchandise, and commodities." . . . [Here follows the rest of the passage at p. 1417, *supra*, which ends with "handicraft," on p. 1418.] It was held in this case that a statute laying a tax on the stock of a banking corporation was an excise on the franchise or employment, and as such was constitutional. Since that decision the legislature has often imposed excises upon the franchises of corporations. See *Commonwealth v. People's Five Cents Savings Bank*, 5 Allen, 428; *Commonwealth v. Lowell Gas Light Co.*, 12 Allen, 75; *Commonwealth v. Hamilton Manuf. Co.*, 12 Allen, 298; *Commonwealth v. Provident Institution for Savings*, 12 Allen, 312; *Manufacturers' Ins. Co. v. Loud*, 99 Mass. 146; *Attorney-General v. Bay State Mining Co.*, 99 Mass. 148; *Commonwealth v. Lancaster Savings Bank*, 123 Mass. 493; *Commonwealth v. Barnstable Savings Bank*, 126 Mass. 526; *Connecticut Mutual Life Ins. Co. v. Commonwealth*, 133 Mass. 161.

In *Attorney-General v. Bay State Mining Co.*, *supra*, the court say: "It is not merely the creation of corporate functions and privileges, or the conferring of rights and franchises by the legislature, which entitles the State to tax the possessor of such privileges and rights. The exercise of powers or privileges, and even of occupations, without especial powers or privileges, may be equally subjected to such taxation, under the constitutional authority to 'impose and levy reasonable duties and excises.' It was so considered in the case of *Portland Bank v. Apthorp*, 12 Mass. 252; and the tax of one per cent, laid upon the capital stock of the bank, was justified upon principles equally applicable to individuals transacting similar business, and to brokers, auctioneers, etc."

In *Commonwealth v. Lancaster Savings Bank*, *supra*, the court say: "A duty or excise may thus be exacted not merely upon certain articles produced or brought into the States, but also upon any commodities whatsoever. 'Commodity' is a general term, and includes the privilege and convenience of transacting a particular business; and, upon persons carrying on such business, it has never been questioned that the legislature may levy an excise, or provide that a license must be obtained in order to transact it."

In *Gleason v. McKay*, 134 Mass. 419, it was decided that St. 1878, c. 275, was unconstitutional. That statute attempted to apply St. 1865, c. 238, "to companies, copartnerships, and other associations having a location or place of business within this Commonwealth, in which the beneficial interest is held in shares which are assignable without consent of the other associates specifically authorizing such transfer." The St. 1865, c. 283, imposed an excise tax upon the franchises of cer-

tain corporations. It was held that the tax intended to be imposed by St. 1878, c. 275, was not in the nature of a license fee, but of an excise upon a franchise or privilege, and that the defendant enjoyed no franchises or privileges conferred upon it by the legislature. The defendant was a partnership, the peculiar feature of which was that by agreement between the partners the interest of each might be transferred in much the same manner as stock in an incorporated company. This peculiar feature was held not to be a commodity within the meaning of the Constitution. It is to be noticed that the tax intended to be imposed was not upon a business or employment. The statute in terms applied only to certain kinds of partnership, leaving other partnerships and persons doing the same kinds of business untaxed, and the partnerships taxed possessed no especial privileges derived from the legislature. In *Portland Bank v. Apthorp*, it was said of excises: "Taxes of this sort must undoubtedly be equal; that is, they must operate upon all persons who exercise the employment which is so taxed." As the tax considered in *Gleason v. McKay* was not upon a business or employment, and as there was no franchise or privilege conferred by the legislature, the distinction between partnerships with transferable shares and those without rendered the tax unequal and unreasonable, because it was a discrimination founded upon an immaterial fact. See *Oliver v. Washington Mills*, 11 Allen, 268.

When the Constitution of Massachusetts was adopted, Massachusetts was in many respects an independent State, and the legislature could lay duties and imposts on imported goods, wares, and merchandise, as well as excises on domestic goods, wares, merchandise, and commodities, and taxes and assessments upon the persons and estates of the inhabitants. The Constitution of the United States took from the States the right to lay imposts and duties on imports and exports, but it did not affect the other powers of taxation possessed by the States, unless they interfered with the powers granted to the United States. The language of the Constitution of Massachusetts is general, and may well be held to authorize the laying of excises upon all such gainful employments and privileges as are created or may be regulated by law, and commonly have been considered legitimate subjects of taxation in other States and countries. We are of opinion that the privilege of transmitting and receiving by will or descent property on the death of the owner is a commodity within the meaning of this word in the Constitution, and that an excise may be laid upon it. Although St. 1891, c. 425, in form imposes a tax upon the property which passes in the manner described in the first section, yet the tax plainly is not meant to be a substitute for the annual tax upon estates, or to be an additional tax of that nature; the statute can only take effect by regarding the tax as an excise, and the statute should be so construed as to take effect, if such a construction reasonably can be given to it. We see no difficulty in doing this, and are of opinion that the statute was intended to impose a tax in the nature of an excise.

The only other condition expressed in the Constitution is that duties and excises must be reasonable. In *Connecticut Mutual Life Ins. Co. v. Commonwealth*, 133 Mass. 161, 163, the court say: "The power to determine what callings, franchises, or privileges, or, to use the language of the Constitution, 'commodities,' shall be subjected to an excise, and the amount of such excise belongs exclusively to the legislature. The provision that it must be 'reasonable' was not designed to give to the judicial department the right to revise the decisions of the legislature as to the policy and expediency of an excise. Great latitude of discretion is given to the legislature in determining not only what 'commodity' shall be subjected to excise, but also the amount of the excise and the standard or measure to be adopted as the foundation of the proposed excise. The court cannot declare a tax or excise illegal and void, as being unreasonable, unless it is unequal, or plainly and grossly oppressive, and contrary to common right."

The tax imposed by the statute we are considering is said to be unequal, because it is not imposed upon all estates and upon all heirs, devisees, legatees, and distributees. To make a distinction between collateral kindred, or strangers in blood, and kindred in the direct line in reference to the assessment of such a tax, either by exempting the kindred in the direct line or by imposing on collaterals and strangers a higher rate of taxation, has the sanction of nearly all States which have levied taxes of this kind. It has a sanction in reason, for the moral claim of collaterals and strangers is less than that of kindred in the direct line, and the privilege is therefore greater. The tax imposed by this statute is uniformly imposed upon all estates and all persons within the description contained in it, and the tax is not plainly and grossly oppressive in amount.

It is also contended that the tax is unreasonable on account of the exemption contained in the proviso of the first section of the statute. In all, or nearly all, systems of taxation there are some exemptions, but the objection here is that estates whose value, after the payment of all debts, shall not exceed ten thousand dollars are exempt without regard to the value of the property received by the devisees, legatees, heirs, or distributees. It is argued that the excise, if upon the privilege of taking property by will or descent, should be the same whenever the privilege enjoyed is the same in kind and extent, whatever may be the value of the estate, and that the exemptions should relate to the value of the property received by those who have the privilege of receiving it, and not to the value of the estate. But the right or privilege taxed can, perhaps, be regarded either as the right or privilege of the owner of property to transmit it on his death by will or descent to certain persons, or as the right or privilege of these persons to receive the property. The tax, too, has some of the characteristics of a duty on the administration of estates. The cost of administering small estates is proportionately greater than that of administering large ones; and this of itself, particularly in intestate estates, operates to diminish the amounts received

very much as a tax would. The statutes of the different States and nations which have levied taxes on devises, legacies, and inheritances have usually made exemptions, and these have sometimes related to the value of the estates and sometimes to the value of the property received by the heirs, devisees, legatees, or distributees. The exemption in the statute under consideration is certainly large as an exemption of estates, but it is peculiarly within the discretion of the legislature to determine what exemptions should be made in apportioning the burdens of taxation among those who can best bear them, and we are not satisfied that this exemption is so clearly unreasonable as to require us to declare the statute void.

The result is, in the opinion of a majority of the court, that in *Williams v. Bowditch*, the judgment rendered for the defendant must be affirmed; and that in *West v. Phillips et al.*, as no other objection has been taken to the decree of the Probate Court, the decree must be affirmed.

In *Minot v. Winthrop* there are several remaining questions.¹ . . .

LATHROP, J. I am unable to concur in the opinion of the majority of the court. It proceeds upon the grounds that "the privilege of transmitting and receiving by will or descent property on the death of the owner is a commodity within the meaning of this word in the Constitution," and that the tax imposed is a reasonable one. I differ from my brethren on both grounds.

The meaning of the word "commodity" was first defined in *Portland Bank v. Apthorp*, 12 Mass. 252, as meaning "privilege, profit, and gains." The tax in that case, which was upon the stock of banking corporations, was held to be constitutional on the historical ground that the legislature had exercised the right for thirty years of exacting a sum of money, in the nature of a license, from those carrying on certain employments; that this was a contemporaneous construction of the Constitution, and was therefore justified; and that the same principle applied to corporations as to individuals. In other words, the word "commodity" was held to mean the privilege of carrying on business, because the legislature both before and soon after the framing of the Constitution had levied an excise tax on certain classes of business.

In all the subsequent cases where an excise tax has been held to be constitutional, the decision has been put upon the ground that the tax was upon the franchise of the corporation; namely, upon its privilege of doing business. *Commonwealth v. People's Five Cents Savings Bank*, 5 Allen, 428; *Commonwealth v. Lowell Gas Light Co.*, 12 Allen, 75; *Commonwealth v. Hamilton Manuf. Co.*, 12 Allen, 298; *Commonwealth v. Provident Institution for Savings*, 12 Allen, 312;

¹ For a like decision in Maine (July, 1894), see *State v. Hamlin*, 30 Atl. Rep. 76. See also *supra*, p. 1271. Compare *Matter of Tax on Est. of Hoffman*, 12 N. Y. Law Journal, 189 (Oct. 20, 1894, N. Y. Court of Appeals); *State v. U. S. & Can. Exp. Co.*, 60 N. H. 219 (1890). — ED.

Manufacturers' Ins. Co. v. Loud, 99 Mass. 146; *Commonwealth v. Lancaster Savings Bank*, 123 Mass. 493; *Attorney-General v. Bay State Mining Co.* 99 Mass. 148; *Commonwealth v. Barnstable Savings Bank*, 126 Mass. 526; *Connecticut Ins. Co. v. Commonwealth*, 133 Mass. 161.

In *Commonwealth v. Lancaster Savings Bank*, 123 Mass. 493, by the terms of the statute, a tax was to be assessed on the first day of May on the average amount of deposits for the six months preceding that day. In the preceding December the bank was restrained by an injunction from doing further business, and placed in the hands of receivers. The corporation was not dissolved by these proceedings, and it was contended that it was liable to pay the tax. It was, however, held that the tax was a franchise tax upon the privilege of doing business, and that, as the bank was not doing business on the first day of May, it was not liable.

It will be noticed in the case last cited that the tax was on the average amount of deposits during the six months prior to a certain day. During some of these months it had received deposits, but, as it was not doing business on the day named, it was held not to be liable to the tax.

In *Gleason v. McKay*, 134 Mass. 419, the legislature sought to impose an excise tax upon copartnerships "in which the beneficial interest is held in shares which are assignable without consent of the other associates specifically authorizing such transfer." The statute was held to be unconstitutional. Morton, C. J., said: "The imposition is clearly not in the nature of a license fee, but is an excise upon a franchise or privilege. The right to levy excises upon franchises has never been extended further than to corporate franchises specially granted by the government, or enjoyed or exercised by its permission. . . . If this tax can be upheld, it seems to us that the necessary result will be that the legislature has the power to select any business, occupation, or calling carried on, or any natural right enjoyed, under the protection of our laws, and impose upon it at its will a special tax or excise, this would be extending the meaning of the word 'commodities' beyond any reasonable limits. Its effect would be to break down the limitations which the Constitution intended to impose upon the power of the legislature, for the purpose of securing the end that all sums necessary for the defence and support of the government should as far as practicable be raised by the equal taxation of the people."

The case last cited seems to me not distinguishable from the case at bar. I am also unable to see, if the privilege of transmitting and receiving by will or descent property on the death of the owner is to be considered a commodity, why the privilege of holding property cannot be considered a commodity, and why all taxes cannot be levied as excise taxes, and the burden of supporting the government be imposed upon one class in the community without regard to proportion or equality. And thus the intent of the Constitution be entirely disregarded.



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